160 U.S. 276

TRANSCRIPT OF RECORD.

160-276

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 94.

JOHN KEANE, PLAINTIFF IN ERROR,

vs.

ANNA SOPHIA BRYGGER, EXECUTRIX, AND OLE SCHILLESTEAD, EXECUTOR, OF THE ESTATE OF JOHAN BRYGGER, DECEASED.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

FILED MARCH 17, 1892.

(14,992.)

(14,992.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 94.

JOHN KEANE, PLAINTIFF IN ERROR,

vs.

ANNA SOPHIA BRYGGER, EXECUTRIX, AND OLE SCHILLESTEAD, EXECUTOR, OF THE ESTATE OF JOHAN BRYGGER, DECEASED.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

INDEX.

	Original.	Print.
Transcript from district court of Territory of Washington	1	1
Complaint	1	1
Order to show cause	4	3
Bond upon restraining order	5	4
Answer and counter-claim	7	5
Reply	13	9
Order that present status of the case be preserved, &c., March 23, 1889	16	11
Order changing venue	17	11
Transcript from superior court of State of Washington	18	12
Order setting cause for trial	18	12
Order beginning trial	19	12
Final decree, July 17, 1890	20	12
Appeal bond	21	13
Order for continuance	24	14
Order for continuance	25	15
Defendant's requests for findings of fact	26	15

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., AUGUST 20, 1895.

	Original.	Print.
Defendant's requests for conclusions of law	28	16
Findings of fact	30	18
Conclusions of law	33	20
Defendant's exceptions to findings of fact	35	21
Defendant's exceptions to conclusions of law	37	22
Order vacating decree of July 17, 1890, and re-entering same, August 9, 1890	39	23
Petition of defendant for new trial	40	23
Exhibit "D"—Affidavit of John Schweitzer	47	28
"E"—Affidavit of Sarah A. Keane	49	29
"F"—Affidavit of John Keane	50	30
"G"—Affidavit of T. M. Reed, Jr.	52	31
Notice of petition for new trial	53	31
Order continuing motion for new trial	54	32
Demurrer to petition for new trial	55	32
Order sustaining demurrer	56	33
Stipulation as to use of stenographer's notes	57	33
Notice of appeal	58	34
Appeal bond	59	34
Stipulation to send up exhibits with record on appeal	62	36
Order to send up exhibits with record on appeal	63	36
Statement of facts	64	37
Plaintiffs' offerings, &c.	64	37
Testimony of Ole Schillestad	69	40
Mrs. Anna Sophia Brygger	75	45
Motion for nonsuit	78	48
Defendant's offerings	79	49
Testimony of Gardner Kellogg	81	50
John Keane	83	51
Lemuel J. Holgate	93	60
W. H. White	97	64
Plaintiffs' offerings in rebuttal	99	65
Testimony of Daniel Bagley	101	66
John Arthur	104	68
T. M. Reed, Jr.	106	69
S. F. Coombs	109	72
John Schweitzer	112	74
Judge's certificate to statement of facts	113	75
Clerk's certificate to exhibits	114	76
Plaintiffs' Exhibit I—Deed, Brownell to Holgate, Nov. 2, 1863	115	76
H—Letter, Commissioner to register and receiver, January 28, 1889	118	78
G—Letter, Secretary to Commissioner, March 14, 1890	121	78
F—Certified copy of letters testamentary	123	80
E—Certified copy of oath of executors	125	81
D—Will of John Brygger and probate thereof	127	82
C—Deed, Ross to Brygger, April 4, 1876	136	87
B—Deed, Bagley to Ross, March 10, 1864	139	88
A—Approved list No. 14 of Washington Territory university selections	142	91

	Original.	Print.
Rules of practice in cases before the United States district land office and the General Land Office and the Department of the Interior, approved August 13, 1885	146	92
Register's certificate, June 17, 1890, offered by defendant but not admitted	165	108
Deed, Bagley to Ross, March 10, 1864, offered by defendant but not admitted	166	108
Defendant's Exhibit 7—Certificate of naturalization of John Keane	169	110
4—Letter, receiver to Keane, April 4, 1889	171	111
3—Letter, register and receiver to Schweitzer, July 12, 1882	173	112
2—Receipt, receiver to Keane, October 20, 1888	175	113
6—Envelope addressed "John Kane"	177	113
Register entries as to applications No. 204 and No. 3566	178	114
Clerk's certificate to exhibits	179	115
Order taking cause under advisement	181	115
Opinion	182	115
Decree	195	124
Order denying rehearing	196	124
Clerk's certificate	197	124
Citation	198	125
Writ of error	200	125
Bond	202	126
Clerk's certificate	205	128

1 In the District Court of the Third Judicial District of Washington Territory, Holding Terms at Seattle for the County of King.

ANNA SOPHIA BRYGGER, Executrix, and OLE SCHILLESTAD, Executor, of the Estate of Johan Brygger, Deceased, Plaintiffs,
vs.
JOHN KEANE, Defendant.
No. 6576.

Complaint.

The plaintiffs come, by their attorneys, Jacobs & Jenner, and, for cause of action against defendant, allege:

I.

That one Johan Brygger, in his lifetime, was the owner in fee and entitled to the possession of the S. W. ¼ of the N. W. ¼ of section 11, township 25 north, of range 3 east, in King county, Washington Territory.

II.

Plaintiff- further alleges that said Johan Brygger died in said King county, in said Territory, on the 20th day of November, A. D. 1888, the owner in fee and entitled to the possession of the above-described property at the time of his death.

III.

Plaintiffs allege that said Johan Brygger, deceased, left a last will and testament; which last will and testament was duly admitted to probate in the probate court of King county, in said Territory, on the 20th day of December, A. D. 1888.

The plaintiffs allege that the plaintiff Anna Sophia Brygger was duly appointed executrix of the estate of decedent, and the plaintiff Ole Schillestad was duly appointed executor of the estate of decedent by said probate court on the 20th day of December, A. D.
2 1888, and both have qualified and entered on the discharge of the duties of their office.

IV.

Plaintiffs allege that the real property heretofore described is assets in their hands for the payment of debts and legacies and expenses of administration, and they have been in possession of the same since their appointment aforesaid, and that decedent at the time of his death was in possession of the same and had been in actual possession of the same for over ten years before his death.

Plaintiffs allege that a part of the dwelling-house of decedent in which his family resides is on said property; that there is on said land a large and costly barn and outhouses, an orchard and garden; that the same is surrounded with a fence and is mostly improved.

Plaintiffs allege that defendant did, on the 12th day of February, A. D. 1889, open the fences surrounding said land and with servants and teams and lumber entered upon the same with the declared intention of building a house thereon and to claim the same, and declared his intention to hold the possession of all the above-described lands.

V.

The plaintiffs allege that the aforesaid Anna Sophia Brygger is not only executrix of the estate of said John Brygger, deceased, but the residuary devisee of all of his estate remaining after the payment of the legacies and bequests mentioned in the will of said decedent.

VI.

The plaintiffs' title to said land and the claim to the possession thereof is as executors of the estate of said Johan Brygger, deceased. Plaintiffs allege that said estate is unsettled, and legacies, bequests, and expenses of administration are to be paid.

VII.

3 Plaintiffs allege that defendant threatened to continue the opening and breaking of the fences on said land, and threatened to continue the hauling of lumber and other materials on said land, and to continue to enter the same by himself and servants, and to erect a house and other buildings thereon.

Plaintiffs aver that the orchard and garden and dwelling-house, outhouses, and barn are all thereby exposed to destruction or great damage by stock and the estate of John Brygger, deceased, greatly impaired.

VIII.

Plaintiffs further allege that defendant is unable to answer in damages for the injury already done and that which is threatened by him, and there is great danger that he will put the same into execution.

Plaintiffs ask for judgment for the recovery of said land and for an order restraining defendant, his servants or agents, from interfering with the possession of said land or the improvements thereon and restraining him or his servants from opening or breaking the fences or doing other damage thereto during the pendency of this litigation and for his costs and disbursements, to be taxed.

JACOBS & JENNER,
Att'ys for Plaintiffs.

TERRITORY OF WASHINGTON, }
County of King, } ss:

Ole Schillestad, being duly sworn, on oath says that he is one of the plaintiffs named in the above-entitled action; that he has heard the foregoing complaint read, knows the contents thereof, and believes the same to be true.

OLE SCHILLESTAD.

Subscribed and sworn to before me this 14th day of Feb'y, A. D. 1889.

H. J. JACOBS,
Notary Public.

(Indorsed:) Filed Feb. 15, 1889. W. E. Ledgerwood, clerk.

4 In the District Court of the Third Judicial District of Washington Territory, Holding Terms at Seattle.

FRIDAY, *February 15th*, 1889.

ANNA SOPHIA BRYGGER, Executrix, and OLE SCHILLESTAD, Executor, of the Estate of John Brygger, Deceased, Plaintiffs,
vs.
JOHN KEANE, Defendant. } No. 6576.

Order to Show Cause.

Upon reading the complaint filed herein, it appearing to the court that the defendant should be enjoined from doing the acts complained of in said complaint and the court being fully advised in the premises, it is now ordered by the court that the defendant be, and he is hereby, ordered to show cause before this court, on the 19th day of February, 1889, at four o'clock p. m., at the court-room, in Seattle, why a temporary restraining order should not be granted herein, and in this meantime and until the hearing of this order to show cause the defendant, his agents and servants, are enjoined from opening or breaking down the fences surrounding or enclosing the southwest quarter of the northwest quarter of section eleven, in township 25 north, of range 3 east, in King county, Washington Territory, and from entering upon said land with wagons, teams, or otherwise and from the erection of a house or other structure thereon and from interfering with the buildings or any of them thereon.

This order to take effect upon plaintiffs filing a bond herein with two good sureties in the sum of one thousand dollars.

THOMAS BURKE, *Judge.*

Entered, Journal "Q," page 345.

5 In the District Court of the Third Judicial District of Washington Territory, Holding Terms at Seattle.

FRIDAY, *February 15th*, 1889.

ANNA SOPHIA BRYGGER, Executrix, and OLE SCHILLESTAD, Executor, of the Estate of Johan Brygger, Deceased, Plaintiff-, *vs.* JOHN KEANE, Defendant. } 6576.

Bond.

Know all men by these presents that we, Anna Sophia Brygger, executrix, and Ole Schillestad, executor, of the estate of Johan Brygger, deceased, plaintiffs in the above-entitled action, principals, and Steffen Pederson and Adam Orth, sureties, all residents of King county, Washington Territory, are held and firmly bound unto John Keane, the defendant in the above-entitled action, in the sum of one thousand ($1,000) dollars, lawful money of the United States, to be paid to the said John Keane, his executors, administrators, or assigns; for which payment, well and truly to be made, we bind ourselves, our and each of — heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals. Dated this — day of February, A. D. 1889.

The condition of the above obligation — that whereas in the above-entitled cause of action a restraining order has been granted by the above-entitled court, to be operative on the above-named defendant, his servants and agents, until the 19th day of February, A. D. 1889, and until a hearing can be had:

Now, therefore, if said plaintiffs shall pay all damages and costs to the defendant herein which may accrue to the defendant by reason of said restraining order, should the same be dissolved, then this obligation shall be null and void; otherwise to be and remain in full force and effect.

6 ANNA SOPHIA BRYGGER. [SEAL.]
OLE SCHILLESTAD. [SEAL.]
STEFFEN PEDERSON. [SEAL.]
ADAM ORTH. [SEAL.]

Sealed and delivered in presence of—
ARNT IVERSON.
D. M. HAYSETH.
H. J. JACOBS.
T. L. HAMILTON.

TERRITORY OF WASHINGTON, *County of King*, } *ss.*:

Steffen Pederson and Adam Orth, being first duly sworn, on oath, each for himself, deposes and says that he is a resident of King county, Washington Territory, and that he is not a counsellor or

attorney at law, sheriff, clerk of the district court, or other officer of such court, and that he is worth the sum of two thousand dollars over and above all debts and liabilities and exclusive of property exempt from execution.

STEFFEN PEDERSON.
ADAM ORTH.

Subscribed and sworn to before me this 15th day of February, A. D. 1889.

H. J. JACOBS,
Notary Public.
THOMAS BURKE, *Judge.*

Entered, Journal "Q," page 346.

7 TERRITORY OF WASHINGTON, } ss:
Third Judicial District, County of King, }

In the District Court, Holding Terms at Seattle.

ANNA SOPHIA BRYGGER, Executrix, and OLE SCHILLESTAD, Executor, of the Estate of John Brygger, Deceased, Plaintiffs,
vs.
JOHN KEANE, Defendant. } No. 6576.

Answer & Counter-claim.

Comes now said defendant and protesting that this court has no jurisdiction over the subject-matter of the above-entitled action, to wit, the land in the complaint herein described, and saving all his rights by reason of such want of jurisdiction, yet for answer and defense to said complaint alleges and shows:

I.

Defendant denies each and every allegation in the first paragraph of said complaint contained.

II.

Defendant denies each and every allegation in the second paragraph of said complaint contained, except the allegation that Johan Brygger died in said King county at or about the time alleged in said paragraph.

III.

Answering the third paragraph in said complaint contained, the defendant alleges that he has not sufficient knowledge or information upon which to form a belief respecting any of the allegations therein; wherefore he denies each and every — thereof.

IV.

Answering the fourth paragraph of said complaint, defendant denies that the real property therein referred to is assets in the

hands of the plaintiffs or any of them for the payment of debts and legacies & expenses of administration or of any or either
8 of said matters, or for any purpose whatever, or in any respect or manner whatever. The defendant further denies that the plaintiffs have or that any or either of them has been in the possession of said real property since their or either of their appointment as executrix and executor respectively, as in said complaint set forth, if such appointment has been made, or at any time or at all, and alleges that if they have or any or either of them has been in such possession the same was at all times wrongful and unlawful and without any color of right. Defendant further denies that said Johan Brygger at the time of his death or at any time or at all was in possession of said real property, and alleges that if said Brygger ever was in such possession the same was at all times wrongful and unlawful and without any color of right. Defendant further denies that said Johan Brygger was in possession of said real property for over ten years before his death, or for ten years, or for any time, or at all, and alleges that if he ever was in such possession the same was wrongful and unlawful and without any color of right.

Defendant, further answering said paragraph, alleges that if a part of the dwelling-house of said Brygger is on said property the same was wrongfully and unlawfully placed there, and further alleges that if the barn, outhouses, orchard, and garden in said paragraph mentioned are upon said property the same were and each of them was put there wrongfully and unlawfully and without any color of right.

Defendant, further answering said paragraph, denies that there is any fence surrounding said land, and denies that he opened fences surrounding the same, and alleges that the rails temporarily removed by him for the purpose of reaching said land had been wrongfully and unlawfully placed where they were, notwithstanding which he has restored the same to the position in which he had first found them.

V.

Answering the fifth paragraph of said complaint, defendant alleges that he has not sufficient knowledge or information upon which to form a belief respecting the allegations or any of them therein contained; wherefore he denies the same.

9 VI.

Answering the sixth paragraph of said complaint, defendant alleges that he has not sufficient knowledge or information upon which to form a belief respecting the allegations or any of them therein contained. Wherefore he denies the same and in particular denies that said Johan Brygger ever at the time had any title, legal, equitable, or otherwise, to said land or any part thereof, and denies that the estate of said Johan Brygger has or ever had any right, title, interest, or claim in or to said land or any part thereof.

VII.

Answering the seventh paragraph of said complaint, defendant denies that the orchard and garden and dwelling-house, outhouses, and barn therein mentioned are or that any or either of them is in the least exposed to destruction or damage by stock or otherwise or to any injury or loss whatsoever by reason of anything done or intended or attempted by the defendant, and denies that the estate of said Johan Brygger is thereby exposed in any manner to the least impairment or damage. Defendant further alleges that he has done and intends to do no damage whatsoever to any fence or fences on said land, if any there are, notwithstanding that the same, if any, have been wrongfully and unlawfully placed thereon without color of right.

VIII.

Answering the eighth paragraph of said complaint, defendant denies each and every allegation therein contained, and in particular denies that any injury has been done or threatened by him to any *intent* property or claim of the plaintiff, and denies that he has any intention to do such injury. Defendant, further answering said paragraph, alleges that he is fully able to answer in damages for any injury which can or may arise from his occupation of said land.

Wherefore defendant prays to be dismissed hence with his costs.

10 *Defense and Counter-claim.*

And further answering the said complaint of the plaintiffs and as and for new matter constituting a first and separate defense thereto, the defendant alleges—

I.

That prior to the filing of said complaint herein and on the thirteenth day of February, A. D. 1889, the plaintiffs instituted and commenced an action against this defendant in the justice's court of N. Soderberg, Esq., a justice of the peace in and for said county of King, residing and holding his said office in Seattle precinct, in said county, for the same and identical alleged cause of action which is alleged in the complaint herein, and praying the judgment of said court against this defendant for the recovery of the possession of the land and premises in the complaint herein and in the complaint in said last-mentioned action described; that said justice's court is a court of competent jurisdiction in the premises.

II.

That said last-mentioned action is still pending and undetermined in said justice's court.

Wherefore the defendant prays to be dismissed hence with his costs.

And further answering the said complaint of the plaintiffs herein

and for a further and separate defense and counter-claim herein against said plaintiffs and addressing the same to the Honorable Thomas Burke, C. J., judge of said court, this defendant alleges—

I.

That on and before the twentieth day of October, A. D. 1888, that certain tract of land in said county of King known and described as the southwest quarter of the northwest quarter of section No. eleven, in township number twenty-five north, of range No. 3 east, of the Willamette meridian (S. W. ¼ of N. W. ¼, S. 11, T. 25
11 N., R. 3 E.), being the same land in the complaint herein described and referred to and containing forty (40) acres, according to the United States survey, was unappropriated public land of the United States.

II.

That on said last-named date this defendant was the head of a family, was over the age of twenty-one years, and was a citizen of the United States, and had never theretofore taken up or entered any public land of the United States under the homestead laws.

III.

That on said last-named date this defendant, being duly qualified thereunto, duly tendered at the United States land office in Seattle, in said county, his application to enter and take up and appropriate said land under the provisions of the said homestead laws.

IV.

That defendant made said application for his exclusive use and benefit and for the purpose of actual settlement and cultivation and not either directly or indirectly for the use or benefit of any other person, and paid to the United States the legal fees in such cases prescribed and was thereupon duly permitted to enter said land under said homestead laws, and did on said day enter the same.

V.

That defendant's said entry of said land was thereupon duly made of record and has ever since continued to be and now is a valid subsisting entry and appropriation of said land and of the whole thereof by this defendant.

VI.

That six months have not elapsed since the said entry and appropriation of said land by this defendant.

VII.

That neither said Johan Brygger nor said plaintiffs nor any or either of them ever had or now have any right, title, or interest in or to said land or any part thereof.

12 Wherefore this defendant prays that he may have such relief in the premises as the nature and circumstances of the case may require and as may be within the jurisdiction of this court to award, with his costs and disbursements herein.

JOHN ARTHUR,
Att'y for Defendant.

TERRITORY OF WASHINGTON, } ss:
County of King, }

I, John Keane, being first duly sworn, depose and say: I am the defendant named in the above-entitled action. I have heard read the foregoing answer and know the contents thereof and believe the same to be true.

JOHN KEANE.

Subscribed and sworn to before me this 21st day of February, 1889.

JOHN ARTHUR,
Notary Public.

Service of copy of the foregoing answer is hereby admitted this 23rd day of February, 1889.

JACOBS & JENNER,
Attorneys for Plaintiff.

(Indorsed:) Filed Feb. 23, 1889. W. E. Ledgerwood, clerk, by H. T. Hannon, deputy clerk.

13 In the District Court of the Third Judicial District of Washington Territory, Holding Terms at Seattle, for the County of King.

ANNA SOPHIA BRYGGER, Executrix, and OLE SCHILLESTAD, Executor, of the Estate of John Brygger, Deceased, Plaintiffs,
vs.
JOHN KEANE, Defendant. } No. 6576.

Reply.

Plaintiffs come by their attorneys, Jacobs & Jenner, and for reply to the fourth paragraph in defendant's answer herein deny that the possession of John Brygger, their testator, or their possession after the death of said John Brygger, was wrongful or unlawful or without color of right; deny that the dwelling-house on said property was wrongfully and unlawfully placed there; deny that the barn, outhouses, orchard, and garden on said land were wrongfully or unlawfully placed there, and deny that they were placed there without a color of right.

Deny that the rails removed by defendant had been wrongfully or unlawfully where they were. Plaintiffs, in answer to the seventh paragraph of defendant's answer, deny that defendant was not

doing damage, and deny that he did not intend to do any damage to the fence or fences on said land.

I.

Plaintiff-, in reply to the first defense and counter-claim set up by defendant, admit that they did at the time set forth in the answer & before the justice mentioned therein commence an
14 action of forcible entry and detainer, and that said action is still pending, and plaintiffs allege that the same is the action described in the defendant's answer.

Plaintiff-, in reply to the second defense and counter-claim, deny that the land described in the first paragraph of said defense or counter-claim, being the same as that described in the complaint herein, was on and before the 20th day of October, 1888, unappropriated and public land of the United States, and deny that the same has been unappropriated and public land since the 10th day of March, A. D. 1864.

II.

Plaintiffs, in reply to the third paragraph of said defense, deny that said defendant on the 20th day of October, A. D. 1888, or at any other time, duly tendered to the United States land office in Seattle or elsewhere his application to enter or take up or appropriate said land under the provisions of the homestead law.

III.

Plaintiffs, in reply to paragraph 4th, deny that defendant was duly permitted to enter said land under the provisions of the homestead law.

IV.

Plaintiffs, in reply to paragraph fifth of said defense, deny that his application or entry was duly made of record in said land office; deny that the same has been since or continues to be or now is a valid or subsisting entry and appropriation of said land.

V.

Plaintiffs, in reply to the seventh paragraph of said defense, deny each and every allegation of the same.

JACOBS & JENNER,
Att'ys for Plaintiffs.

15 TERRITORY OF WASHINGTON, } ss:
County of King, }

Ole Schillestad, being first duly sworn, on oath says that he is one of the plaintiffs named in the above-entitled action; that he has heard the foregoing reply read, knows the contents thereof, and believes the same to be true.

OLE SCHILLESTAD.

Subscribed and sworn to before me this 27th day of February, A. D. 1889.

H. J. JACOBS,
Notary Public.

(Indorsed:) Filed Feb. 27, 1889. W. E. Ledgerwood, clerk, by H. T. Hannon, deputy clerk.

16 In the District Court of the Third Judicial District of Washington Territory, Holding Terms at Seattle.

SATURDAY, *March 23rd*, 1889.

ANNA SOPHIA BRYGGER, Executrix, and OLE SCHILLESTAD, Executor, of the Estate of John Brygger, Deceased, Plaintiffs, } 6576.
vs.
JOHN KEANE, Defendant.

Order.

In this cause, after argument by the respective counsel of the parties, and the court being advised in the premises, it is

Ordered that the present status of the case, in respect of the order to show cause and temporary restraining order, be preserved until the further order of this court, and that either of said parties may call up the case for further consideration upon giving a three days' notice to the opposite party.

Dated at Seattle, W. T., March 23, 1889.

THOMAS BURKE, *Judge.*

Entered, Journal "R," page 169.

17 In the District Court of the Third Judicial District of Washington Territory, Holding Terms at Seattle.

SATURDAY, *April 20*, 1889.

ANNA SOPHIA BRYGGER, Executrix, and OLE SCHILLESTAD, Executor, of the Estate of John Brygger, Deceased, Plaintiffs, } 6576.
vs.
JOHN KEANE, Defendant.

Order Changing Venue.

It appearing to the satisfaction of this court that the judge thereof is by law disqualified from trying said cause, it is hereby ordered that the place of trial of this cause be changed from this court to the district court of the second judicial district of said Territory, holding terms at Tacoma, in the county of Pierce, and that the clerk of this court transmit thereto all the pleadings and papers

herein, together with a certified transcript of all journal entries in this cause.

Dated at Seattle, W. T., April 20, 1889.

C. H. HANFORD, *Judge.*

Entered, Journal "R," page 253.

18 In the Superior Court of King County, State of Washington.

SATURDAY, *June* 7, 1890.

ANNA SOPHIA BRYGGER *et al.* vs. JOHN KEANE. } 6576.

Ordered by the court that this cause be, and the same is hereby, set for trial Wednesday, June 18, 1890.

LICHTENBERG, *Judge.*

Entered, Journal 8, page 107.

19 In the Superior Court of King County, State of Washington.

WEDNESDAY, *June* 18, 1890.

ANNA S. BRYGGER *et al.* vs. JOHN KEANE. } 6576.

Trial.

Now, on this 18th day of June, this cause comes on for trial in open court, plaintiffs being present in person and accompanied by their counsel, Jacobs & Hall, and defendant present in person and accompanied by his counsel, W. R. Andrews. The trial proceeds by the examination of witnesses on the part of plaintiff as well as on the part of defendant and by the reading of affidavits.

And now, the hour of adjournment having arrived, by consent of parties it is ordered by the court that this cause be, and the same is hereby, continued until 9.30 o'clock a. m. tomorrow.

LICHTENBERG, *Judge.*

Entered, Journal 8, page 201.

20 In the Superior Court of King County, State of Washington.

THURSDAY, *July 17th*, 1890.

ANNA SOPHIA BRYGGER, Executrix, and OLE SCHILLESTAD, Executor, of the Estate of John Brygger, Deceased, Plaintiffs, vs. JOHN KEANE, Defendant. } 6576.

Final Decree.

In consideration of the facts and law above found herein it is considered by the court that plaintiffs have and recover of the de-

fendant herein the premises described in the complaint herein, to wit, the S. W. ¼ of the N. W. ¼ of sec. 11, in township 25 north, of range 3 east, W. M., in King county, State of Washington, and *his* costs and disbursements, to be taxed, and that the injunction heretofore granted herein be made perpetual.

17 July, 1890.

LICHTENBERG, *Judge.*

Entered, Journal 8, page 420.

21 In the Superior Court of King County, State of Washington, Thursday, July 31, 1890.

ANNA SOPHIA BRYGGER, Executrix, and OLE SCHILLESTAD, Executor, of the Last Will and Testament of Johan Brygger, Deceased, Plaintiffs, *vs.* JOHN KEANE, Defendant. } 6576.

Appeal Bond.

STATE OF WASHINGTON, *County of King,* } *ss.:*

Know all men by these presents that we, John Keane, as principal, and James Gill and Timothy Ryan, as sureties, are held and firmly bound unto Anna Sophia Brygger and Ole Schillestad, the plaintiffs in the above-entitled action, in the sum of one thousand five hundred dollars, lawful money of the United States of America; for which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals this 23rd day of July, A. D. 1890.

The condition of this obligation is such that whereas Anna Sophia Brygger and Ole Schillestad, the plaintiffs in said action, have recovered judgment therein against said defendant, and said defendant, John Keane, has appealed to the supreme court of the State of Washington from the judgment and decision and findings of fact and conclusions of law made and entered against him
22 in said action in said superior court of King county in favor of Anna Sophia Brygger and Ole Schillestad, plaintiffs, on the 17th day of July, 1890, and is desirous of staying the execution of the judgment so appealed from:

Now, therefore, if the said defendant and appellant shall pay to the said Anna Sophia Brygger and Ole Schillestad, plaintiffs and appellees, all costs and damages that shall be adjudged against said appellant on the appeal, and also satisfy and perform said judgment in case it shall be affirmed and any judgment or order which the supreme court may render herein or order to be rendered by said superior court, not exceeding the amount or value of said original judgment, and all rents or damages to the property involved in this controversy during the pendency of the appeal out of the possession

of which said appellees are kept by reason of the appeal, then this obligation to be void; otherwise to remain in full force and effect.

JOHN KEANE. [SEAL.]
JAMES GILL. [SEAL.]
TIMOTHY RYAN. [SEAL.]

Signed, sealed, & delivered in presence of—
JOHN ARTHUR.

23 STATE OF WASHINGTON, } ss:
County of King, }

James Gill and Timothy Ryan, the sureties on the above obligation, being duly sworn, each for himself on oath says: I am a resident of said State and county. I am not an attorney-at-law, sheriff, clerk, or other officer of the superior court. I am worth the sum of one thousand five hundred dollars ($1,500) over and above all my liabilities and debts and property exempt from execution.

JAMES GILL.
TIMOTHY RYAN.

Subscribed and sworn to before me this 23rd day of July, A. D. 1890.

JOHN ARTHUR,
[SEAL.] *Notary Public, Residing at Seattle.*

LICHTENBERG, *Judge.*

Approved & filed this 24th day of July, 1890.

M. M. HOLMES, *Clerk.*

Entered, Journal 8, page 516.

21 In the Superior Court of King County, State of Washington.

SATURDAY, *August 2nd*, 1890.

ANNA SOPHIA BRYGGER } 6576.
vs.
JOHN KEANE. }

Continued.

Ordered by the court that this cause be, and the same is hereby, continued until Tuesday, August 5th, 1890.

LICHTENBERG, *Judge.*

Entered, Journal 8, page 534.

25 In the Superior Court of King County, State of Washington.

TUESDAY, *August 5th*, 1890.

ANNA SOPHIA BRYGGER *et al.* vs. JOHN KEANE. } 6576.

Continued.

Ordered by the court that this cause be, and the same is hereby, continued until Saturday, August 9th, 1890.

LICHTENBERG, *Judge.*

Entered, Journal 8, page 583.

26 In the Superior Court of King County, State of Washington.

SATURDAY, *August 9th*, 1890.

ANNA SOPHIA BRYGGER, Executrix, and OLE SCHILLESTAD, Executor, of the Last Will and Testament of John Brygger, Deceased, Plaintiffs, vs. JOHN KEANE, Defendant. } 6576.

Request for Findings of Fact and Conclusions of Law.

Comes now the defendant, by his attorneys, W. R. Andrews and John Arthur, and requests the court to find herein the following facts, to wit:

I.

That on the 14th day of February, 1864, and on the 10th day of March, 1864, and at all times in February and March, 1864, the land in controversy was included in homestead entry No. 204, of Lemuel J. Holgate, and was included in and covered by said homestead entry until the 20th day of December, 1871.

II.

That on the 14th day of February, 1864, and on the 10th day of March, 1864, and on the 14th day of March, 1864, and at all times in February and March, 1864, said Holgate was living upon said land as a homestead settler and entryman, and improving the same for the purpose of making it his permanent home, and did not leave the same until about December, 1864.

III.

That on the 4th day of April, 1889, the receiver of the United States land office at Seattle, Washington, transmitted to the defendant by unregistered mail, in care of his attorney, a letter to the effect that the Commissioner of the General Land Office
27 held said defendant's entry for cancellation, which said letter was the first and only notice of said holding or decision given to defendant.

IV.

That by rule No. 77 of the rules of practice in cases before the district land offices, the General Land Office, and the Department of the Interior in force at said time the defendant had thirty (30) days, together with ten (10) days for transmission through the mail to him and from him, from said 4th day of April, 1889, for filing, either in said Seattle land office or in the office of the Commissioner of the General Land Office, a motion for rehearing or review of said holding or decision of the Commissioner of the General Land Office; that within the period so allowed by said rule the defendant did file both in the Seattle land office and in the office of the Commissioner of the General Lond Office a motion for rehearing and review of said holding and decision.

V.

That before said period had elapsed and on the 22nd day of April, 1889, the Secretary of the Interior certified said land to the University of the Territory of Washington; which said certification was subsequently entered of record under the seal of the Commissioner of the General Land Office on the 9th day of May, 1889, and before the period had elapsed within which defendant could legally file his motion for rehearing and review.

VI.

That by reason of said certification of the Land Department the United States lost jurisdiction over said land.

VII.

That by said loss of jurisdiction the defendant had no further remedy in said Land Department.

VIII.

That the complaint in this action was filed in this court on the 15th day of February, 1889, prior to the time of said certifi-
28 cation and before the time had elapsed for defendant to move for such rehearing and review, and before said Land Department had lost jurisdiction over said land, and while the title to said land was still in the United States.

IX.

That on the 11th day of January, 1861, the legislative assembly of the Territory of Washington passed an act appointing Daniel Bagley, John Webster, and Edmund Carr a board of commissioners to select, locate, and dispose of lands reserved for university purposes in the Territory of Washington by the act of Congress of July 17th, 1854.

X

That the deed of said land to John Ross was made by Daniel Bagley alone.

Conclusions of Law.

Defendant requests the court to find the following conclusions of law:

I.

That by reason of said homestead entry No. 204 of Lemuel J. Holgate remaining uncancelled on the records of the Land Department until December 20th, 1871, said land did not become vacant public land of the United States and subject to selection for the University of the Territory of Washington until the said last-named date.

II.

That upon said date it became vacant public land of the United States and open to pre-emption or homestead settlement, and was so vacant when the defendant filed his homestead entry thereon.

III.

That by defendant's said homestead entry said land was appropriated to him.

29

IV.

That defendant's said homestead entry was unlawfully cancelled.

V.

That said land was unlawfully certified by the Land Department to the Territory of Washington, and no right passed to the plaintiffs or to their testator, his grantors, by such certification.

VI.

That the legal title to said land conveyed by said certification inures to the benefit of the defendant, and the plaintiffs hold the same in trust for him.

VIII.

That the defendant is entitled to a decree for the conveyance of said legal title to him, and for the dismissal of this action, and for the dissolution of the temporary restraining order heretofore issued in this cause.

Respectfully submitted.

W. R. ANDREWS &
JOHN ARTHUR,
Att'ys for Defendant.

Service of a copy hereof is hereby accepted this 18th day of July, A. D. 1890.

JACOBS & JENNER &
W. LAIR HILL,
Att'ys for Plaintiffs.

9 Aug., '90.—Court refuses to find any and all of the facts & conclusions of law as above requested. To each and every of said rulings def't excepts. Exception allowed.

LICHTENBERG, *Judge.*

9 Aug., '90.

Entered, Journal 10, page 1.

30 In the Superior Court of King County, State of Washington.

SATURDAY, *August* 9, 1890.

ANNA SOPHIA BRYGGER, Executrix, and OLE SCHILLESTAD, Executor, of the Last Will and Testament of John Brygger, Deceased, Plaintiffs,
vs.
JOHN KEANE, Defendant. } No. 6576.

Decree.

This cause came on for hearing on the 18th and 19th days of June, A. D. 1890, upon the pleadings and the evidence taken herein before the Honorable L. J. Lichtenberg, the equity judge of said court; Jacobs & Jenner and W. Lair Hill appearing for plaintiff, and William R. Andrews and John Arthur, Esqrs., appearing for the defendant.

After the hearing of the testimony taken herein in open court on the days above mentioned and the reading of the pleadings herein, *and* the court, being fully advised, after argument of counsel makes the following findings of fact and of law herein:

Findings of Fact.

1st. We find from the evidence and the pleadings herein that on the 10th day of March, A. D. 1864, the Territory of Washington, through its university commissioners, before that time appointed, executed and delivered to John Ross a deed for the land in controversy for the consideration of two hundred and forty dollars, paid by said John Ross to said university commissioners. We find that said deed was subsequently recorded in the auditor's office of King county, to wit, on the 4th day of February, A. D. 1865.

We find that on the 4th day of April, A. D. 1876, said John Ross duly sold and conveyed by deed to John Brygger, the testator herein, the same land for the consideration mentioned in the deed, to wit,

31 which last deed was duly recorded on the 22nd day of April, 1876, in the office of the auditor of King county. The property in the deed of said university commissioners to said John

Ross and the deed from said John Ross to said John Brygger, deceased, described the property as the southwest quarter of the northwest quarter of section 11, township 25 north of range 3 east, in King county, Washington Territory, being the property in dispute herein.

2nd. We find that prior to the year A. D. 1864 one Lemuel Holgate had filed a homestead filing on the land in controversy, but that he had duly relinquished his right, title, and interest, and all of his right, title, and interest of, in, and to or growing out of said homestead filing to the United States of America in February, A. D. 1864.

3rd. We further find that the university commissioners of Washington Territory before that time selected the land in controversy, among other lands, and filed a list of such selections in the local land office in said Territory, which said list was known and recognized in the Land Department of the Government as list No. 2. We further find that said list No. 2 was filed in the proper local land office in March, A. D. 1867, and that in said list said land was located and selected, among other lands, for university purposes.

4th. We further find that John Brygger, mentioned aforesaid, entered into possession of the land in controversy immediately upon receiving a deed from said John Ross and wife, to wit, on or about April, 1876, and remained in possession of said land in controversy until the day of his death, to wit, December, 1888. We find that he improved the lands in controversy by cultivation, erecting outhouses, planting of trees, the clearing away of the forest, and the erection of fences around the entire tract, with the exception of a small portion of the tract bordering on the county road, and
32 that three years prior to the bringing of this suit and about that time prior to the entry of the defendant herein said John Brygger erected a dwelling-house, a portion of which dwelling-house was on the land in controversy, and the other portion of said house on an adjoining piece of land owned by him, and that he and his family resided in said dwelling-house up to the time of his death.

5th. We find that the said John Brygger died testate, and that in his last will and testament, which was duly probated in the probate court of King county, then Territory, now State, of Washington, on the 17th day of December, A. D. 1888, and that Ole Schillestad and Anna Sophia Brygger, plaintiffs herein, were named in said last will and testament as the executor and executrix of the estate of said John Brygger, deceased, and were duly appointed by the probate court of said King county after the probate of said last will and testament. Said Anna Sophia Brygger, one of the plaintiffs herein, was the wife and the residuary devisee of said John Brygger, deceased. We further find that as such executor and executrix they duly qualified and assumed the duties of their respective offices.

6th. We further find that they in their representative capacity continued in the actual possession of the premises in controversy up to the time of the entry and actual ouster of defendant.

7th. We find that on the 22nd day of April, A. D. 1889, the Honorable John R. Noble, Secretary of the Interior, issued his certificate

under the act of Congress approved March 14th, 1864, after due proof, including the land in controversy, and approving the same as a grant in fee-simple to said Territory and to its vendees, under and by virtue of said act.

8th. We further find that on or about October 20th, 1888, the defendant, John Keane, entered his homestead filing in the
33 land office at Seattle on the land in controversy, and that in the year, to wit, February, 1889, he took up his residence on a portion of said land under said homestead filing; that he did some clearing and removed a portion of the fence in order to get into said premises and erected a building on said land within the fencing thereon; that notices at and prior to the erection of said building by the said Keane was posted on said land by the plaintiffs giving notice of their said rights, claims, and title to said land, and also that personal notice was given to the same effect to said John Keane, the defendant.

9th. We further find that John Keane, defendant herein, was a citizen of the United States at the time of his said entry, and that he was competent to make a homestead entry under the laws of the United States at said time.

10th. We further find that relinquishment of Lemuel J. Holgate was made and executed and delivered in February, 1864, but that the cancellation of said Lemuel J. Holgate's entry was not actually made on the records of the land department until December, 1871.

Secondly, Conclusions of Law.

1st. We find that there was no subsisting homestead filing of Lemuel J. Holgate on the 10th of March, A. D. 1864, that being the day of the sale of the university commissioners to John Ross, mentioned aforesaid.

2nd. That the certificate of the Honorable John R. Noble, Secretary of the Interior, dated April 22nd, and given under the act of Congress approved March 14th, A. D. 1864, relates back and takes effect from the date of said sale, to wit, March 10th, A. D. 1864.

3rd. We further find as a matter of law that the home-
34 stead entry filing of said defendant, John Keane, was void and of no force nor effect, absolutely invalid; that he has no right, title, or interest to said land under and by virtue of said filing.

4th. We further find *that* as a matter of law that the title and possession of said land in controversy is in the plaintiffs as executor and executrix of said Brygger, the said Brygger being the vendee of said John Ross, the immediate vendee of the Territory.

5th. We find as a matter of law that the plaintiffs are entitled to a decree for the possession of the land in controversy and for their costs and disbursements herein.

LICHTENBERG, *Judge.*

9 Aug., '90.—The def'ts except- to each and every finding of fact and conclusion of law. Exception allowed.

LICHTENBERG, *Judge.*

Entered, Journal 10, page 5.

35 In the Superior Court of King County, State of Washington.

SATURDAY, *August* 9, 1890.

ANNA SOPHIA BRYGGER, Executrix, and OLE SCHILLESTAD, Executor, of the Last Will and Testament of John Brygger, Deceased, Plaintiffs,
vs.
JOHN KEANE, Defendant. } No. 6576.

Exceptions to Findings of Fact and Conclusions of Law.

Comes now the defendant, by his attorneys, W. R. Andrews and John Arthur, and excepts as follows to the findings of fact and conclusions of law hereinbefore found by the court:

I.

Defendant excepts to the first findings of fact in this, to wit:

He excepts to the findings that on the 10th day of March, A. D. 1864, the Territory of Washington, by its university commissioners, before that time appointed, executed and delivered to John Ross a deed for the land in controversy, upon the ground that the same is not supported by the evidence.

He excepts to the finding in said paragraph that on the 4th day of April, 1876, said John Ross duly sold and conveyed by deed to Johan Brygger, the testator herein, the land referred to, upon the ground that the same is not supported by the evidence.

He excepts to the finding in said paragraph that the university commissioners made a deed to said John Ross for the property in controversy, or any part thereof, upon the ground that the same is not supported by the evidence.

II.

Defendant excepts to the finding in paragraph 2nd that Lemuel J. Holgate duly relinquished his right, title, and interest and all of his right, title, and interest to, in, and of or growing out of
36 his homestead filing on said land to the United States of America, in February, 1864, upon the ground that the same is not supported by the evidence.

III.

Defendant excepts to the finding in paragraph 3rd that the university commissioners of Washington Territory before February, 1864, or at any time in February, 1864, selected the land in controversy, among other lands, and excepts to the findings that the com-

missioners filed a list of said selections in the local land office in said Territory, and further excepts to the findings in said paragraph that the said land was located and selected, among other lands, in list No. 2 or in any list, upon the ground that the same is not supported by the evidence.

IV.

Defendant excepts to the finding in paragraph 4th that said Johan Brygger entered into possession of the land in controversy on or about April, 1876, and remained in possession thereof until December, 1888, on the ground that the same is not supported by the evidence.

V.

Defendant excepts to the *filing* in paragraph 6th and to the whole thereof upon the ground that the same is not supported by the evidence.

VI.

Defendant excepts to the finding in paragraph 7th and to the whole thereof upon the ground that the same is not supported by the evidence.

VII.

Defendant excepts to the finding in paragraph 8th that notices were posted on said land by plaintiffs at and prior to the erection of his building thereon by the defendant, giving notice of plaintiffs' rights, title, and claims to said land, and further
37 excepts to the finding in said paragraph that personal notice was given, to the same effect, to the defendant, upon the ground that the same is not supported by the evidence.

VIII.

Defendant excepts to paragraph 9th that Lemuel J. Holgate made and executed in February, 1864, a relinquishment of said land, upon the ground that the same is not supported by the evidence.

Exceptions to Conclusions of Law.

Excepting to the conclusions of law herein, the defendant excepts to each and every conclusion of law found by the court and to each and every part thereof.

W. R. ANDREWS AND
JOHN ARTHUR,
Attorneys for Defendant.

Service of a copy is hereby accepted this 18th day of July, A. D. 1890.

JACOBS & JENNER &
W. LAIR HILL,
Attorneys for Plffs.

38 The foregoing exceptions coming on this day, the parties being present by their attorneys, the said exceptions are duly presented by the defendant, and each and every of said exceptions is hereby overruled; to which ruling said def'ts excepts. Exception allowed.

LICHTENBERG, *Judge.*

Entered, Journal 10, page 10.

39 In the Superior Court of King County, State of Washington.

SATURDAY, *August* 9, 1890.

ANNA SOPHIA BRYGGER, Executrix, and OLE SCHILLESTAD, Executor, of the Estate of Johan Brygger, Deceased, Plaintiffs,
vs.
JOHN KEANE, Defendant. } 6576.

Final Decree.

The following decree, heretofore entered 17 July, '90, by consent of both parties in open court, is hereby vacated, and the said decree made and re-entered and held as of this date.

9 Aug., '90.

LICHTENBERG, *Judge.*

In consideration of the facts and law above found herein, it is considered by the court that plaintiffs have and recover of the defendant herein the premises described in the complaint herein, to wit:

The S. W. ¼ of the N. W. ¼ of sec. 11, in township 25 north, of range 3 east, W. M., in King county, State of Washington, and his costs and disbursements to be taxed, and that the injunction heretofore granted herein be made perpetual.

LICHTENBERG, *Judge.*

17 July, 1890.

Entered, Journal 10, page 13.

40 In the Superior Court of King County, State of Washington.

ANNA S. BRYGGER *et al.*, Plaintiffs,
vs.
JOHN KEANE, Defendant. } Petition. Equity Department.

To the Hon. I. J. Lichtenberg, judge of the above-entitled court, sitting in the equity department:

Your petitioner for petition herein says:

I.

That your petitioner, John Keane, is the defendant in the above-entitled action.

II.

That said action was tried in the above-entitled court before Hon. I. J. Lichtenberg on the 18th and 19th days of June, 1890.

III.

That John Arthur, Esq., was the attorney for defendant at that time and prior thereto and prepared said cause for trial.

IV.

That your petitioner files herewith as part hereof, marked Exhibit "A," a complete and correct transcript of the reporter's notes of all the testimony taken upon said trial; that said transcript contains a true and correct copy of all testimony introduced in evidence at said hearing upon said trial; that your petitioner since that time, to wit, on the 16th day of July, 1890, discovered the evidence hereinafter set forth, which is new evidence in said cause and which is material and necessary evidence in defendant's behalf and which could not have been discovered at, during, or before said trial, and petitioner says that said testimony and evidence is as follows, to wit:

The only testimony upon the trial of said cause referring to
41 the relinquishment of the land in controversy by Lemuel J. Holgate is the testimony of Daniel Bagley as follows, on page 38 of Exhibit A, in answer to the question, "I will ask you to state what, if anything, you know as to the relinquishment by Mr. Holgate of the land to Mr. Ross.

Ans. I saw the relinquishment before I filed the selection in the land office and before I sold to Mr. John Ross.

Ques. Do you know what became of that relinquishment?

Ans. I filed it or had it filed in the land office at Olympia."

And in the testimony of Mr. Holgate on page 31 of Ex. A:

"Ques. You executed a paper of relinquishment, did you not?

Ans. I cannot recollect now whether I did or not.

Ques. Did you sell that claim down there to anybody?

Ans. Yes, sir.

Ques. To whom did you sell it?

Ans. I sold it to John Ross.

Ques. You sold it to John Ross?

Ans. Yes, sir.

Ques. Did you know John Ross after Ward lived there?

Ans. No; I did not.

Ques. You sold it to John Ross?

Ans. Yes, sir."

Your petitioner has since said trial discovered the following testimony, which is the newly discovered testimony and evidence above referred to, as follows:

Petitioner received on the 16th day of July, 1890, a certified copy of the receiver's receipt issued to said Lemuel J. Holgate on the land in controversy, with the following endorsement thereon:

"SEATTLE, KING CO., W. T., *Feb. 16th*, 1864.

I hereby relinquish all my right and title to the within-described land in favor of John Ross.

(Signed) LEMUEL J. HOLGATE."

42 A true copy of said certified copy is annexed hereto, marked Exhibit "B;" that said endorsement is the same relinquishment referred to in the testimony of Daniel Bagley and the same sale referred to in the testimony of Lemuel J. Holgate, as above set forth; that said receipt and endorsement are on file in the General Land Office, at Washington, in a contest case involving a different portion of the said Holgate homestead from that in the above-entitled cause; that said cause in the said Land Office was a case in which one John Schweitzer was the claimant, and the discovery of this evidence and of the fact of this relinquishment being on file in said cause was discovered by said John Schweitzer after the trial of the above-entitled cause of June 18th and 19th, 1890, in this hon. court; that said Schweitzer wrote to Washington after said trial to ascertain whether or not there was such a relinquishment in file in his case, because he heard the testimony of the said Daniel Bagley and was moved to write there thinking there might be such a paper on file; that the paper on file in the Land Office, at Washington aforesaid, is not an original, but is a copy of the original; that the original is lost, having been returned, as appears from the Land Office records, to the said Lemuel J. Holgate; that, in fact, said alleged relinquishment is not a relinquishment as required by law, but is in effect a quitclaim from said Holgate to said Ross; that petitioner has just received, on the 18th day of September, 1890, information from Washington that said receiver's receipt and relinquishment endorsed thereon are not originals, but copies, by telegram, in words and figures as follows:

WASHINGTON, D. C., *Sept. 8*, 1890.

John Keane, Seattle:

43 Receiver's receipt and relinquishment here do not purport to be original, but copy; can have both photographed if desired.

(Signed) W. A. STONE.

Your petitioner did not know and had no conception at, during, or before said trial of said cause that a relinquishment by said Holgate was relied upon, as no such relinquishment appeared upon the records of the Land Office, and petitioner and his counsel made due and diligent search at the Land Office records and files at and before said trial, both in the local land office at Seattle and in the General Land Office at Washington, D. C.; that the records of said Land Office showed and still show that the receiver's receipt to Lemuel J. Holgate on June 26th, 1863, had been returned to said Lemuel J. Holgate; that there is no record in the Land Office of any relinquishment being endorsed on said original or of any relinquishment having ever been filed, and your petitioner never heard of any relinquishment until the testimony of Daniel Bagley, given upon

said trial, and only learned of the existence of the paper heretofore referred to on the 16th day of July, 1890, when the said John Schweitzer left the certified copy with the wife of petitioner, at his residence in King county, on the land in controversy. Petitioner says that John Schweitzer will testify that he heard the testimony of Daniel Bagley upon the trial of said cause and said nothing about any relinquishment either to petitioner or his counsel or to any one, but wrote to Washington for a certified copy of any relinquishment that might be among the files in his contest case, and on or about the 16th day of July, 1890, he received a certified copy, a copy of which is filed herewith, marked Exhibit "B," and immediately took the same to the residence of petitioner and showed the same to petitioner's wife, Sarah A. Keane, and left word with her to tell petitioner to come to his house, petitioner being then absent from home. As soon as he returned home petitioner went on the
41 same day, in the evening, to the house of the said Schweitzer, and there for the first time saw said relinquishment and that all of the said facts and testimony to which said John Schweitzer will testify are true.

And your petitioner further says that said Sarah A. Keane will testify that the said John Schweitzer came to the residence of petitioner on the 16th day of July, 1890, and showed her, the said Sarah A. Keane, the certified copy of the receiver's receipt and relinquishment and requested her to tell petitioner when he should return home, he being then absent, to come to the house of said John Schweitzer and he would show him the said receiver's receipt and relinquishment. Petitioner says that all of the facts and testimony to which the said Sarah A. Keane will testify are true.

Petitioner further says that T. M. Reed, Jr., who is now the receiver of the United States land office at Seattle, will testify that the land-office records show and showed at and long prior to the commencement of the above-entitled action the receiver's receipt issued to Lemuel J. Holgate on June 26th, 1863, for the homestead, a part of which is now in controversy in this action, was cancelled in 1871; that no relinquishment appears on the land-office records from the said Lemuel J. Holgate to the United States.

V.

And, for further ground for new trial herein, petitioner says that prior to the filing of list No. 2 by the board of the university commissioners on the 5th day of March, 1867, the said board of University commissioners had been and was abolished by an act of the territorial legislature of Washington, approved January 31st,
45 1867, which took effect and was in force from and after its passage, as appears by its terms.

That your petitioner is a simple, unlettered shoemaker, and, although he is charged by the law with knowledge of the law, that he did not know of such repealing act, and that upon trial of said cause the attorney for defendant, your petitioner, and for the plaintiffs and the said judge who presided at the trial did not know, did not discover, and did not consider the existence of such act;

that your petitioner had no copies and had access to no copies of the Session Laws of the Territory of Washington, and, as matter of fact, could not have known and did not know that such a statute existed; that petitioner files herewith as part hereof the affidavits of John Schweitzer, Sarah A. Keane; your petitioner, John Keane, and T. M. Reed, Jr., marked respectively Exhibit "D," "E," "F," and "G." The pleadings and exhibits on file in said cause are here referred to and made a part of this petition.

Wherefore petitioner prays:

I.

That the judgment heretofore entered in said cause be set aside, and that a new trial be granted in said cause, at which your petitioner may have an opportunity to introduce new evidence, the testimony here and now offered.

II.

That in case this honorable court should not deem it necessary to order a new trial that said judgment be set aside and a judgment be entered in said cause dismissing plaintiff's complaint and for defendant's costs.

III.

And petitioner prays for all proper and general equitable relief.

JUNIUS ROCHESTER,
Att'y for Petitioner.

46 STATE OF WASHINGTON, }
County of King, } ss:

John Keane, being first duly sworn, on his oath deposes and says that he is the petitioner named in the foregoing petition and defendant in the above-named cause; that he has read the foregoing petition, knows the contents thereof, and that the same is true.

JOHN KEANE.

Subscribed and sworn to before me this 15th day of November, 1890.

[SEAL.] JUNIUS ROCHESTER,
Notary Public in and for Washington,
Residing at Seattle.

47 EXHIBIT "D."

In the Superior Court of King County, State of Washington.

ANNA S. BRYGGER *et al.*, Plaintiffs,
vs.
JOHN KEANE, Defendant.

Affidavit of John Schweitzer.

STATE OF WASHINGTON,
County of King, } *ss:*

The affiant, John Schweitzer, says: That I was present at the trial of the above-entitled cause on the 18th and 19th day of June, A. D. 1890, and heard the testimony of Daniel Bagley given at said trial and heard the said Daniel Bagley testify that he saw the relinquishment (meaning the relinquishment of Lemuel J. Holgate to John Ross to the land in controversy in said cause) before he filed the selection (meaning list No. 2) in the land office and before he sold to Mr. John Ross; that affiant has had a contest about a portion of the Lemuel J. Holgate homestead in the land office, but could not remember of any relinquishment to the Government and at once wrote to Washington, to the General Land Office, to discover if any such relinquishment was on file in his homestead-contest case. Affiant says that in reply to that letter on the 16th, 17th, or 18th of July, 1890, after the conclusion of said cause affiant received from the General Land Office a certified copy of a paper on file in said Land Office which purports to be the receiver's duplicate receipt issued to Lemuel J. Holgate for the land in controversy, with an endorsement thereon in words and figures as follows, to wit:

"SEATTLE, KING CO., *Feb. 16th*, 1864.

I hereby relinquish all my right and title to the within-described land in favor of John Ross.

(Signed) LEMUEL J. HOLGATE."

48 That a true copy of said certified copy is annexed to the petition of John Keane prepared for filing herein praying for a new trial; that as soon as affiant received said certified copy he immediately took the same on the same day to the residence of John Keane on the land in controversy and showed the same to said Keane's wife, Mrs. Sarah A. Keane, and left word with her to tell her husband to come to affiant's house, said Keane then being absent from his home; that that evening said Keane came to affiant's house and there for the first time saw said certified copy, and, as affiant believes, for the first time knew or had any information that such a paper was in existence. Affiant says that he will testify to the facts stated in this affidavit upon any trial of any cause in which he is called upon to testify, and that the statements of this affidavit are true.

JOHN SCHWEITZER.

Subscribed and sworn to before me this 15th day of November, 1890.

JUNIUS ROCHESTER,
Notary Public in and for Washington, Residing at Seattle.

49 EXHIBIT "E."

In the Superior Court of King County, State of Washington.

ANNA S. BRYGGER *et al.*, Plaintiffs,
vs.
JOHN KEANE, Defendant.

Affidavit of Sarah A. Keane.

STATE OF WASHINGTON, }
County of King, } *ss:*

The affiant, Sarah A. Keane, says: I am the wife of John Keane, the defendant in the above-entitled action; that I am well acquainted with John Schweitzer; that on the 16th, 17th, or 18th day of July, 1890, which day the affiant cannot now state, the said John Schweitzer came to the home of the said affiant and showed her a certified copy of a receiver's receipt and so-called relinquishment endorsed thereon, a copy of which is filed with the petition of defendant herein, marked Exhibit "B;" that said Schweitzer informed affiant that he had just received the same from Washington city, and requested her to tell her husband, who was then absent from home, to come to the house of said John Schweitzer and he would show him the said document. Affiant says that on the same day, in the evening, she informed her husband upon his return home of the facts hereinbefore alleged, and her husband at once left home and went to the residence of said Schweitzer, affiant accompanying him, and he then and there for the first time saw and read the said receipt and relinquishment endorsed thereon, and affiant says that she believes that was the first knowledge or information that he had of said relinquishment, so called. Affiant further says that the statements of this affidavit are true, and that she will testify to the same upon any trial of the cause if sworn as a witness therein.

SARAH A. KEANE.

Subscribed and sworn to before me this 15th day of November, 1890.

JUNIUS ROCHESTER,
Notary Public in and for Washington, Residing at Seattle.

50 EXHIBIT "F."

In the Superior Court of King County, State of Washington.

ANNA S. BRYGGER *et al.*, Plaintiffs,
vs.
JOHN KEANE, Defendant.

Affidavit of John Keane.

STATE OF WASHINGTON, } ss:
County of King, }

The affiant, John Keane, says: That I am the defendant in the above-entitled action and the petitioner who herewith files a petition for new trial in the above-entitled action; that the statements contained in said petition are true; that I personally and through my attorney, John Arthur, Esq., made diligent and thorough search for everything effecting the title to the land in controversy in the above entitled action in the land office in Seattle and in the General Land Office at Washington, D. C., and by enquiry of Lemuel J. Holgate, John Schweitzer, and of all other persons whom I supposed knew anything about the title thereto, and was unable to ascertain any relinquishment or any evidence of any relinquishment made by Lemuel J. Holgate to the Government or to John Ross or to any person prior to or during said trial; that since that time, to wit, on the 16th, 17th, or 18th of July, 1890, I have discovered and found a copy of the relinquishment testified to by Daniel Bagley, a copy of which is annexed to the petition aforesaid, marked Exhibit "B;" that said copy was found in Washington, D. C., in another suit of which affiant knew nothing until since said trial under circumstances more particularly set forth in said petition; that affiant could not with reasonable or extraordinary diligence have discovered the said copy prior to or during said trial.

51 Affiant says that said copy is necessary and material evidence in said cause, in this, to wit, that the said copy will show that the said alleged relinquishment was not a relinquishment in fact, but was only a quitclaim from the said Lemuel J. Holgate to the said John Ross, and that at the time the said land was alleged to have been selected by the university commissioners as university land it was still reserved from public lands by the homestead entry of said Lemuel J. Holgate, and was not, in fact, relieved from said entry until the year 1871 by limitation of the homestead filing. The affiant here refers to and makes the said petition a part of this affidavit, and says that all of the statements therein are true, and affiant says that the statements of this affidavit are true.

JOHN KEANE.

Subscribed and sworn to before me this 18th day of November, 1890.

JUNIUS ROCHESTER,
Notary Public in and for Washington, Residing at Seattle.

52 EXHIBIT G.

In the Superior Court of King County, State of Washington.

ANNA S. BRYGGER *et al.*, Plaintiffs,
vs.
JOHN KEANE, Defendant.

Affidavit of T. M. Reed, Jr.

STATE OF WASHINGTON, }
County of King, } *ss*:

The affiant, T. M. Reed, Jr., says: I am the register of the United States district land office at Seattle and am and for one year last past have been the legal custodian of the land office records; that said records show and have for more than one years last past shown that the register's receipt issued to Lemuel J. Holgate on the 26th day of June, 1863, for the entry of the southwest quarter of the northwest quarter of section 11 and lot 1 and 2 of section 10, all in township 25 north, of range 3 east, as a homestead, was cancelled December 20th, 1871, under order of Com'r Gen. Land Office under date Dec. 20, 1871, and that no relinquishment appears or for one years last past has appeared on the said land office records from the said Lemuel J. Holgate to the United States or to any one, and affiant says the statements of this affiant are true, and that if called as a witness he will testify as above stated.

T. M. REED.

Subscribed and sworn to before me this 19th day of November, 1890.

JUNIUS ROCHESTER,
Notary Public in and for Washington, Residing at Seattle.

(Indorsed:) Filed Nov. 20, 1890. M. M. Holmes, clerk, by H. H. Smith, deputy.

53 In the Superior Court of King County, State of Washington.

ANNA S. BRYGGER *et al.*, Plaintiffs,
vs.
JOHN KEANE, Defendant.

Notice.

To Anna Sophia Brygger, executrix, and Ole Schillestad, executor, of the last will and testament of John Brygger, deceased, and to Jacobs & Jenner and W. Lair Hill, their attorneys:

You and each of you will please take notice that the defendant, John Keane, has this day filed in the clerk's office of the above-entitled court, with the clerk of said court, a petition for a new trial

on the grounds of newly discovered evidence, a copy of which petition and the affidavits in support thereof is attached to this notice; and you will please take further notice that the said John Keane, by his counsel, will call up for hearing the said petition before the Honorable I. J. Lichtenberg, judge of the above-entitled court, in the equity department, in his court-room, in the city of Seattle, on the 13th day of December, 1890, at 10 o'clock a. m., or as soon thereafter as the same can be heard.

JUNIUS ROCHESTER,
Attorney for Defendant.

Received copy foregoing notice Nov. 20th, 1890.

____ ____,
Attorney for Plaintiffs.

Received a copy of the within notice this 20th day of Nov. 1890.
W. LAIR HILL.

(Indorsed:) Filed Nov. 20th, 1890. M. M. Holmes, clerk, by H. H. Smith, deputy.

54 In the Superior Court of King County, State of Washington.

SATURDAY, *December 13th*, 1890.

ANNA SOPHIA BRYGGER *et al.*
vs.
JOHN KEANE. } 6576.

Continued.

Ordered by the court that the motion for a new trial herein be, and the same is hereby, continued until Monday, December 15, 1890, at 2 o'clock p. m.

LICHTENBERG, *Judge.*

Entered, Journal 15, page 74.

55 In the Superior Court of the County of King, State of Washington.

ANNA S. BRYGGER *et al.*, Pl'ff's,
vs.
JOHN KEANE, Def't.

The plaintiffs demur to the petition of def't for vacation of judgment heretofore entered and for a new trial, and for cause of demurrer pl'ffs say:

1. The facts set forth in said petition do not constitute a cause of vacating said judgment or granting a new trial.

2. It appears that the evidence alleged to have been newly discovered could have been discovered by reasonable diligence in time for its use at the trial.

3. It appears said alleged newly discovered evidence is immaterial and that if introduced it ought not to change the judgment.

JACOBS & JENNER &
W. LAIR HILL,
Att'ys for Pl'ff.

(Indorsed:) Filed Dec. 15, 1890. M. M. Holmes, clerk, by J. P. Crawford, deputy.

56 In the Superior Court of King Co., State of Washington.

MONDAY, *December* 15, 1890.

ANNA SOPHIA BRYGGER *et al.*
vs.
JOHN KEANE. } 6576.

Demurrer Sustained.

Now, on this day, this cause comes on for hearing on plaintiffs' demurrer to the petition of defendant for vacation of judgment heretofore entered and for a new trial, and, after argument of counsel and being fully advised in the premises, said demurrer is sustained by the court.

LICHTENBERG, *Judge.*

Entered, Journal 15, page 86.

57 In the Superior Court of King County, State of Washington.

ANNA SOPHIA BRYGGER *et al.*, Plaintiffs,
vs.
JOHN KEANE, Defendant. } No. 6576.

Stipulation.

It is hereby stipulated and agreed in the above-entitled cause that the written report of the proceedings, including the testimony, rulings and orders of the court, objections and exceptions of counsel as furnished by the stenographer from his notes in the trial of said cause taken at the time, when examined and corrected, if necessary, by the judge, shall be and is regarded as a full and complete statement of the facts in said cause.

JACOBS & JENNER,
W. LAIR HILL,
Attorneys for Plaintiffs.
JUNIUS ROCHESTER,
Attorney for Defendant.

(Indorsed:) Filed Jan. 31, 1891. W. B. Spencer, clerk, by H. H. Smith, deputy clerk.

58 In the Superior Court of King County, State of Washington.

SATURDAY, *January* 31, 1891.

ANNA SOPHIA BRYGGER *et al.*, Plaintiffs,
vs.
JOHN KEANE, Defendant. } 6576.

Notice of Appeal.

To Anna Sophia Brygger, executrix, and Ole Schillestad, executor, of the last will and testament of John Brygger, deceased, and Jacobs & Jenner and W. Lair Hill, their attorneys:

You and each of you will please take notice that the defendant in the above-entitled action hereby appeals to the supreme court of the State of Washington from the judgment herein rendered in the said superior court on the 9th day of August, 1890, in favor of the plaintiffs in said action and against said defendant and from the whole thereof, and also from the order denying said defendant's motion for new trial made and entered in the minutes of said court on the 15th day of December, 1890.

JUNIUS ROCHESTER,
Attorney for Defendant.

Received copy of above notice of appeal this 31st day of January, 1891.

W. LAIR HILL,
JACOBS & JENNER,
Attorneys for Plaintiffs.

LICHTENBERG, *Judge.*

Entered, Journal 17, page 212.

59 In the Superior Court of King County, State of Washington, Monday, February 2, 1891.

ANNA SOPHIA BRYGGER, Executrix, and OLE SCHILLESTAD, Executor, of the Last Will and Testament of John Brygger, Deceased, Plaintiffs,
vs.
JOHN KEANE, Defendant. } 6576.

Appeal Bond.

STATE OF WASHINGTON, } ss:
County of King, }

Know all men by these presents that we, John Keane, as principal, and James Gill and Timothy Ryan, as sureties, are held and firmly bound unto the said Anna Sophia Brygger and Ole Schillestad, plaintiffs in the above-entitled action, in the sum of one thousand dollars ($1,000), lawful money of the United States; for which payment, well and truly to be made, we bind ourselves and

each of us, jointly and severally, and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this 31st day of January, 1891.

The condition of this obligation is such that whereas Anna Sophia Brygger and Ole Schillestad, plaintiffs in said action, have received judgment herein against said defendant, John Keane, and said defendant, John Keane, has appealed to the supreme court of the State of Washington from the judgment and findings of fact and conclusions of law made and entered against said defendant in said action in said superior court of King county in favor of said plaintiffs on the 17th day of July, 1890, and the 9th day of
60 August, 1890, also from the order of said superior court overruling the defendant's motion for new trial, made and entered on the — day of December, 1890, and said defendant is desirous of staying the execution of judgment so appealed from:

Now, therefore, if said defendant and appellant, John Keane, shall pay to said Anna Sophia Brygger and Ole Schillestad, plaintiffs and appellees, all costs and damages that may be adjudged against said appellant on appeal, and also satisfy and perform said judgment in case it shall be affirmed and any judgment or order which the supreme court may render herein or order to be rendered by said superior court, not exceeding the amount of value of said original judgment or order, and all rents and damages to property during the pendency of the appeal out of the possession of which the appellees are kept by reason of the appeal, then this obligation to be void; otherwise to remain in full force and effect.

JOHN KEANE. [SEAL.]
JAMES GILL. [SEAL.]
TIMOTHY RYAN. [SEAL.]

Executed in presence of—
THOMAS B. HARDIN.

61 STATE OF WASHINGTON, } ss:
County of King, }

James Gill and Timothy Ryan, being first duly sworn, deposes and say each for himself that he is one of the sureties named in the foregoing bond; that he is above the age of twenty-one years; that he is a *bona fide* resident of said State of Washington and property-owner therein; that he is neither a counsellor or attorney at law, sheriff of county, clerk, or any other officer of a court, and that he is worth the sum of one thousand dollars over and above all his just debts and liabilities, exclusive of property exempt from execution.

JAMES GILL.
TIMOTHY RYAN.

Subscribed and sworn to before me this 31st day of January, 1891.

THOMAS B. HARDIN,
Notary Public in and for the State of Washington,
Residing at Seattle.

LICHTENBERG, *Judge.*

Approved and filed Feb'y 2nd, 1891.

W. B. SPENCER, *Clerk.*

Entered, Journal 17, page 232.

62 In the Superior Court of King County, State of Washington.

ANNA SOPHIA BRYGGER *et al.*, Plaintiffs,
vs.
JOHN KEANE, Defendant. } No. 6576.

Stipulation.

Come now the attorneys, Messrs. Jacobs & Jenner and Hon. W. Lair Hill, for the plaintiffs, and Junius Rochester, Esq., for the defendant, and make the following stipulation and agreement:

It is hereby stipulated and agreed that all of the exhibits filed in the above-styled action shall be sent up to the supreme court of the State with the transcript in said cause and shall be considered and regarded as a part of said transcript.

And it is further stipulated and agreed that the Hon. I. J. Lichtenberg, judge of the above court, may make an order in said cause authorizing the clerk to forward and send all of the exhibits to the supreme court as aforesaid.

WM. LAIR HILL,
JACOBS & JENNER,
Attorneys for Plaintiffs.
JUNIUS ROCHESTER,
Attorney for Defendant.

(Indorsed:) Filed Mar. 12, 1891. W. B. Spencer, clerk, by H. H. Smith, deputy clerk.

63 In the Superior Court of King County, State of Washington.

FRIDAY, *March* 13, 1891.

ANNA SOPHIA BRYGGER *et al.*, Plaintiffs,
vs.
JOHN KEANE, Defendant. } 6576.

Order.

It is hereby ordered that the exhibits on file in the above-entitled cause shall be sent by the clerk of this court with the transcript in said cause to the clerk of the supreme court of the State of Washington, at Olympia, in accordance with and in pursuance of the stipulation herein filed.

I. J. LICHTENBERG, *Judge.*

Entered, Journal 17, page 578.

63½ *Judgment July* 17.

64 In the Superior Court of King County, State of Washington.

ANNA SOPHIA BRYGGER, Executrix, and OLE SCHILLESTAD, Plaintiffs,
vs.
JOHN KEANE, Defendant. } No. 6576.

Trial before Hon. I. J. Lichtenberg, judge, June 18th, 1890.

Hon. Orange Jacobs and W. Lair Hill, of counsel for plaintiffs; John Arthur and W. R. Andrews, of counsel for defendant.

The following proceedings were had, to wit:

Statement of the case by Judge Jacobs.

Mr. ANDREWS: I would like to inquire of counsel if he intends to do anything in the matter of the contempt proceedings.

Judge JACOBS: We propose to try the original case, and that one way or the other will settle all the proceedings. I do not propose to do anything in the contempt proceedings at all. We prefer to try the original case.

Mr. ANDREWS: If your honor please, the record discloses that when the bill was filed grounds were stated in it to give the court jurisdiction to issue an injunction, or at least a temporary restraining order. We have learned from the statement of counsel that this is in the nature of an ejectment, and the only reason why it is in the equity side of the court is because they are seeking an injunction to restrain the defendant from making certain improvements which they allege is injurious to their right. The jurisdiction of the court had not been challenged and the temporary restraining order was issued and then a proce-ding was instituted against Mr. Keane for an alleged violation of the restraining order and he was notified to show cause why he should not be
65 punished for contempt. He made a showing to the court. The hearing was transferred to Tacoma, but it was not heard. The case was subsequently transferred to this court by Judge Allyn and is now before your honor. I think, in order to clear the way, these proceedings for contempt ought to be dismissed at this time, or else there should be a hearing upon it.

The COURT: We think, as far as the contempt proceedings are concerned, we can hold the matter in abeyance until we pass upon the principal case. In other words, necessarily in the contempt proceedings we would have to pass upon some of the questions in the main case and it would save time to do that unless counsel press it.

Statement of defendant's case by Mr. Andrews.

Mr. HILL: We will offer in evidence a certificate of approval of the Commissioner of the General Land Office.

Mr. ANDREWS: We object.

The COURT: Let us have the offer.

Mr. HILL: This is an examination and approval of this list of the selection of the university commissioners, with the certification of the fact that proof had been offered of the sale and *bona fides* thereof, and approving of the list by Commissioner Stockslager, together with the approval thereof by the Secretary of the Interior, covering the land in controversy.

Mr. ANDREWS: This certificate, if your honor pleases, reads as follows (reading): The certificate of the Department of the Interior is dated April 20th, 1889. This action seems to have been commenced on the 15th day of February, 1889. Now, I take it that if the plaintiffs in this case were depending upon a decision of the Department of the Interior that it was their duty to set that *it* out in their pleadings. They allege that they were the *were* in fee-simple, and they must have been the owners in fee-simple at the time of the commencement of this action. Under the theory of this law they were not the owners in fee-simple until this decision was made, for by the provisions of this law the certificate of the General Land Office has the effect of making that the conveyance (reading act in relation to university lands). So that the title vested by reason of this transcript—and this transcript is
66 dated the 20th of April, 1889. Now, it would seem from that and the language of the certificate, taken in connection with the statute, that it is this transcript which shall have the effect of vesting the title in fee-simple, so that at the time of the commencement of the action these plaintiffs were not the owners in fee-simple of the property. There is another serious objection, it seems to me, that the plaintiffs have commenced at the back end of their proofs.

Whether this is done because of the statements we made at the beginning of this case I do not know, but it seems to me that if these people became the purchasers of this land, that if Mr. Ross became the purchaser of this land, that it is necessary to prove that fact to this court; they must prove their ownership. There is another proposition, too. There seems to be an express provision, both in the certificate of the Commissioner of the General Land Office and by the Secretary of the Interior, that this shall have no operation on any valid interfering rights which may have existed at the date of the selection, and so the Commissioner says, said approval being subject to any valid interfering rights which may have existed at the date of the selection. Now, counsel are offering this as conclusive proof of what has been passed upon by the Commissioner of the General Land Office. Furthermore, it appears by the pleadings in this case that Mr. Keane's application to the land office for this land was filed some years ago, in October, 1888. It does not appear in this proceeding that Mr. Keane was a party; it does not appear that he had any notice; it does not appear that if there was a proceeding there that the time of appeal had elapsed. Therefore it does not appear from anything in this certificate that the department, at the time the so-called decision was made, had any jurisdiction upon this land or upon the parties who are claiming this land

at this time, the decision apparently having been made in favor of those claiming the land under the university title. Now, it seems to me, before this paper can be admitted, that they must prove that the department had jurisdiction not only of the subject-matter, but they must prove that they had jurisdiction of the persons.

67 The COURT: We will save some time by asking Mr. Hill to state the purpose of the offer.

Mr. HILL: May it please your honor, the purpose of the offer is to show that the title was at the commencement of this action, and is in the plaintiff by showing that the law has been complied with under which the title could vest in the plaintiff, and then to follow this up with a line of conveyances showing that the title did vest.

(Argument by counsel.)

The COURT: Objection overruled. Exception allowed.

Mr. ANDREWS: There is another objection we should have made to this.

The COURT: We will hear it and dispose of it.

Mr. ANDREWS: It is admitted on the other side that this paper is dated subsequent to the commencement of the action, and if we had thought that this paper would have been offered in evidence in this shape, under the pleadings as they now stand, we certainly would have framed our answer in such a way as to have shown the error of the department, so that it is a surprise to us.

The COURT: Objection overruled. Exception allowed. Do we understand you now ask to amend your pleadings on the ground of surprise?

Mr. ANDREWS: We would like to amend our pleadings so as to show the error of the Commissioner of the General Land Office and the Secretary of the Interior.

Mr. HILL: We object to this. This is a public record of which all persons are supposed to take notice from the date of its rendition. This is a certified copy of the record.

(Argument by counsel.)

The COURT: I will overrule the motion and give you an exception. (Paper marked Exhibit "A.")

Mr. HILL: I offer the deed of Daniel Bag-ey, of the board of commissioners, to John Ross for the land in controversy, dated—I do not see the date. It is acknowledged on the 10th day of March, 1864, and recorded in October, 1864.

The COURT: What is the date of the deed?

Mr. HILL: The 10th of March, 1864.

Mr. ANDREWS: Here is a deed or something that purports to be a deed. It seems to bear no date at all—yes; the 10th of March, 1864. The deed is executed apparently by Daniel Bagley, who signs himself as president of the board of commissioners.

68 The deed shows upon its face by reference to the act of Congress that the Territory of Washington had no power or authority to do anything more than select the lands, and no purchaser can be a *bona fide* purchaser, because he is attempting to

acquire title in violation of law. Mr. Bagley had no right to make this deed; he was not authorized to make the deed on behalf of the board.

(Argument by counsel.)

The COURT: The objection will be overruled. Exception allowed.

(Paper received and marked Exhibit "B.")
(At this time further proceedings were adjourned until 2 p. m.)

(*Continuation of Proceedings Pursuant to Adjournment at 2 p. m.*)

Mr. HILL: We offer in evidence, if the court please, the deed of John Ross to John Brygger, dated the 4th day of April, 1876, embracing the property in question, recorded April 22nd, 1876; this is a certified copy.

Mr. ANDREWS: We object because there is no right shown in John Ross to make such a conveyance.

The COURT: Under your former objection I think we will overrule it and give you an exception.

(Paper received and marked Exhibit "C.")

Mr. HILL: We offer in evidence the last will and testament of John Brygger, together with the probate of the same, appointing O. Schillestad and Mrs. Brygger the executor and executrix thereof; probated on the 17th day of December, 1888. This is a certified copy.

Mr. ANDREWS: The same objection to this that we have already made.

The COURT: The same ruling and exception.

Mr. HILL: We offer the oath of qualification of Anna Sophia Brygger and Ole Schillestad as executrix and executor. The date of the subscribing the oath is the 20th of December, 1888. This is a certified copy.

Mr. ANDREWS: I object to the introduction of the oath because there is no showing as to anything except the filing of the oath. There is no issuing of letters and there is no bond filed.

The COURT: We will admit it. Exception allowed.

69 (Paper received and marked Exhibit "E.")

Mr. HILL: It seems there was an omission to certify one of the documents I wanted. I will offer it as soon as it can be prepared—the letters testamentary.

Mr. ANDREWS: They may be offered when they are brought in.

Mr. OLE SCHILLESTAD, after being duly sworn, testified as follows:

(Judge JACOBS:)

Q. Mr. Schillestad, you are the Schillestad who are mentioned as plaintiff in this case?

A. Yes, sir.

Q. What relation do you sustain to the case?
A. I am ——

Mr. HILL: I offer in evidence the record of the letters testamentary of Mr. Schillestad and Mrs. Brygger. I will have them replaced by certified copy.

Mr. ANDREWS: The counsel one time made the proposition to me that the record—for instance, the record of the probate court—has no business in the superior court.

Mr. HILL: I accept as an impropriety and think that counsel ought always to bring certified copies of the record, as the original evidence of the fact ought to be kept in the office, and I agreed to that, and that is the reason I said I would put in the certified copy in the place of it.

Mr. ANDREWS: Let counsel do that when they get to it.

The COURT: Is this a simple offer in lieu of the certified copy simply to keep the record straight? Is there any objection to that, preserving, however, a right you may have to put the certified copy of the letters in when they are produced?

Mr. ANDREWS: No, if your honor please.

Q. Did you know John Brygger in his lifetime?
A. Yes, sir.
Q. What relation did you sustain to his estate after he died?
A. I was appointed his executor.
Q. Was there anybody else with you?
A. His wife.
Q. What is the name?
A. Anna Sophia Brygger.
Q. Do you know the land in question here—the southwest quarter of the northwest quarter of se-tion 11, township 25 north of range 3 east?
A. Yes, sir; I do.
Q. Well, now, state in whose possession that land was at the time of Mr. Brygger's death and just before.
A. The largest part of it ——

70 Mr. ANDREWS: I want to hasten the matter as fast as we can. I would like counsel to show in whose possession it was.

Q. Do you know in whose possession it was?
A. Yes, sir.
Q. Well, in whose possession was it?
A. There is a good deal of it clear.
Q. Possession, I ask?
A. It was Mr. Brygger's.
Q. Now, what was its condition as to buildings or clearing and improvements, etc.?
A. Well, there was lots of buildings there and fences and gardens, etc., gardens and trees and fruit trees; a main dwelling-house that Mrs. Brygger lived in, stands, the main part of it, up on the forty and part of it — of the forty. There is other big buildings and a

barn, different houses 15 x 17, a garden and house, another small dwelling-house, and some houses, outhouses.

Q. About there being any fruit trees or shrubbery?

Mr. ANDREWS: I think it is immaterial about these improvements; they are to recover on title, not by improvements.

Judge JACOBS: They set this up in their complaint and they deny this.

Q. How long before his death did Brygger have possession of his premises?

A. He lived there right after he bought it. He bought it probably fourteen or fifteen years ago, but he didn't move on that forty then; he moved on the next piece to it and built a house there by the bay. He done some improvements there later; he had some fences.

Q. When did he live upon this forty in dispute?

A. He built the house there about three years ago.

Q. Did he have any barns or other houses on the premises before he moved there?

A. No; not that he had built himself. He had a logger there that logged off some land around there, and he built a barn upon that forty and there was some fencing done, but the dwelling-house I built myself, but, as I say, it stands half on the line.

Q. Who did you build it for?

A. For John Brygger; I built another little house for his hired man.

Q. John Brygger, your testator?

A. Yes, sir.

71 Q. When did Mr. Brygger die?

A. He died on the 20th day of November, 1888.

Q. At the time this suit was brought state whether the estate had been settled or not.

Mr. ANDREWS: I think the records of the probate court are the best evidence, if your honor please.

A. The estate was settled this last fall, and the will was approved——

Mr. ANDREWS: I think the best evidence would be the records of the probate court.

Q. State whether or not there was a fence running to this place at the time of Mr. Brygger's death.

A. Yes, sir; the whole forty was fenced, except at the northeast corner. The county road ran about the fence in a kind of a curve at the northeast corner, and that is not fenced; all the rest is fenced off.

Q. How much was left out by the county road on the forty?

A. I could not say; about four or five acres; I don't know how much; I could not say exactly.

Q. State if anybody took possession of these premises. If so, when?

A. Well, I could not tell you the date. We heard that somebody had been in there and commenced to do clearing before John Brygger died; quite a good while before. Some one said that John Keane——

Q. Well, I ask with reference to Keane. When did Keane, the defendant, take possession or enter into possession?

A. He took possession a little before John Brygger died. I don't know exactly the date, but not long before; I think it was in November

Q. A little before Brygger died?

A. Yes, sir; he tore down the fences; he had some lumber and he was going to build. I went there and took a notice to him, notifying him not to do it.

Q. State how he got into possession of the premises.

A. Well, he took down the fences to get the team — in hauling the lumber, and then he had his men there going to build the house.

Q. State whether the defendant has been in possession of the premises ever since; in the house; living there.

A. Yes, sir; he lives there now.

72 Q. State whether there was any consent from you or Mrs. Brygger in regard to possession.

A. No, sir; we notified them about it. We took notices around there and I gave him a notice when the man was there himself, and he said that he had a good right there because he had a homestead filing.

Q. He entered, then, against your will?

A. Yes, sir.

Q. And your co-executrix?

A. And Brygger gave me power of attorney to go up and have him arrested or something before he died.

Q. How long after his death was it before you commenced this proceeding?

Mr. ANDREWS: We object. It is immaterial.

A. It was in February. I am not sure of the day.

Q. When did he die?

A. In November, the 20th, 1889, two years ago.

Q. 1889 or 1888?

A. This is 1890, is it not? Two years ago—well, 1888.

Q. Was it February, 1889, that Mr. Keane——

A. Yes, sir; 1889; in 1888 he died, the 20th of November.

Q. Where is this land, in this county?

A. Yes, sir; county of King.

Q. Situated near what place?

A. Near Salmon bay, or Ballard, now called—town. 25 north, of range 4 east.

Q. Now, state what Mr. Keane, since he has been in possession there, what he has done, cut the timber, moving fences, or anything of that kind.

Mr. ANDREWS: I don't think there is any claim here for com-

pensation for injury to those premises. If that is so, then no testimony as to trespass or injury to the freehold would be material.

The COURT: What is the purpose of this testimony?

Mr. HILL: Among the things asked for in this complaint is that he be enjoined from further injuring the freehold, and, of course, as to that part of the matter there was nothing to complain of unless he was doing or threatening to do some such thing.

The COURT: For the purpose of showing that he has been there and not for the purpose of recovering damage?

Mr. HILL: Yes, sir.

73 The COURT: For that purpose we will admit it. Exception allowed.

Q. Well, state what his actions have been about the destruction of timber or fences or anything of else.

A. I have seen Keane there myself, working, and I saw Keane sawing wood or clearing, whatever you call it—cutting logs and throwing some fences down. He has built some houses there and built some more houses there; the houses I have seen since the commencement of this proceeding.

Q. Well, has anything been done by you or Mrs. Brygger notifying him that the premises belonged to the estate or anything of that kind?

A. That was done there and then personally before he moved in, before he came there, and we had men there watching him, telling him not to take down the fences again to come in.

Q. Well, what did he do?

A. Well, I don't think I have got a right to say what I didn't see personally.

Q. Only what you saw yourself?

A. I was not there myself.

Q. Well, state what Mr. Keane did, what he himself continued to do from the time he himself went there to the present time.

A. Well, as I said before, lately I don't think he has done anything, but I have seen things burning there and the fences are down, but I don't know—I could not tell you what he has done.

Q. Who claims possession of the premises?

A. Mrs. Brygger did.

Q. Well, does the defendant claim a right to the possession of the premises?

A. I suppose he did when he had that homestead filing. I don't know what he does now.

Mr. ANDREWS: Yes, we claim a right to the possession of the premises. I will admit that to the court.

Cross-examination.

(Mr. ANDREWS:)

Q. When did you last see Mr. Keane making the improvements there?

A. Well, I don't know exactly the date.

Q. Have you seen him making any improvements since you made application for his arrest for contempt of court?

A. Yes, sir.

Q. What have you seen him doing?

—. I haven't seen him personally doing anything, but I have seen his buildings that were made after the application for a restraining order.

Q. The buildings have been improved since then?

74 A. Yes, sir; there were no doors and windows; it was only boards up and down. Now there is windows and doors and shingles and outho-ses and a barn, I think.

Q. The building has been made comfortable, that is all?

A. All these things were made after the restraining order, and they claim there is four cows and a calf in the field there all the time. I have seen the cows. They say they belong to Mr. Keane.

Q. How much fencing has been built since this restraining order was granted?

A. Well, that fence seemed—there was an old fence along the county road, and there is a fence around Mr. Keane's house—a narrow strip up and down. I don't know how much there is. He fenced off his house.

Q. How many acres has he fenced in?

A. I could not say—half an acre or something like that.

Q. That is all the improvements that you have noticed there?

A. That is all; yes, sir; except he has been sawing some logs around there and burning them up.

Mr. HILL: I will offer this certified copy now.

Mr. ANDREWS: We make the same objection.

The COURT: The same ruling and exception allowed.

(Papers received and marked Exhibit "F.")

75 Mrs. ANNA SOPHIA BRYGGER, one of the plaintiffs, after being duly sworn, testified as follows:

(Judge JACOBS:)

Q. Do you know this land in dispute?

A. Yes, sir.

Q. When did you- husband move onto this land?

A. Well, after the house was built; that was about three years, but we have had possession of the land for about fourteen years.

Q. You have been in possession of the land for about fourteen years?

A. Yes, sir.

Q. You are the widow of Mr. Brygger?

A. Yes, sir.

Q. Well, when was the house built—three years before his death or three years from this time?

A. Well, it was——

Q. How long before his death was the house built?

A. It was three years.

Q. It was three years before his death?

A. Yes, sir.

Q. What kind of a dwelling-house is it?

A. Well, it is a house about $2,000.00.

Q. Well, how high is it—how many stories?

A. Two stories.

Q. How long is it and how wide?

A. I could not tell you. I guess the builder could.

Q. You don't know?

A. I don't know.

Q. Was there any other building on this place before Mr. Keane went there—on his lot—on this tract?

A. Yes, sir.

Q. How many?

A. Well, there was two—the shop and the chicken-house and small outhouse for the renters on the place and a barn.

The COURT: On this 40-acre piece?

A. Yes, sir.

Q. Any fruit trees? If so, what were they?

A. Yes; there was fruit trees—raspberries and strawberries and a field of clover.

Q. How much of it, if any, has been plowed?

A. I could not tell you how many acres.

Q. Some of it has been plowed?

A. Yes, sir; some of it has been plowed, and, of course, the garden is plowed up.

Q. Was there a garden on this forty acres?

A. Yes, sir.

Q. State whether the 40 acres was fenced or not.

A. Yes, sir; they were fenced.

Q. When did Mr. Keane come on the premises?

A. Well, that is about a year ago now, I think.

76 Q. Well, was it before or after Mr. Brygger's death?

A. A. Well, Mr. Keane started out before Mr. Brygger died, but then we put up notice and kept him away for two or three months; then he came back in February.

Q. What did he do when he came back?

A. Well, he tore down the fence and commenced to clear it. Of course, it was partly cleared before, but he had to make a foundation for the house.

Q. He tore down the fence and came inside this 40-acre field?

A. Yes, sir.

Q. And commenced to do what, you say?

A. He commenced to level up the ground to *to* put on a foundation for a house.

Q. Well, state whether he put the foundation up or not.

A. Well, yes; he put the house up.

Q. State whether that was in opposition to your wishes, etc., or to your husband's.

Mr. ANDREWS: We object. We have no objection to any notice that she gave him.

The COURT: Whatever acts that either Mr. Brygger did or had done. What were the acts that you did to show it? What did he do, what notice?

Q. Well, when Mr. Keane came upon the premises, what did Mr. Brygger do?

A. Well, he gave Mr. Schillestad power to put up notices and tell Mr. Keane not to take possession of the land.

Q. Why?

A. Because it belonged to Mr. Brygger, and he did not want him to do that.

Q. Do you know what became of these notices?

A. I don't understand you.

Q. Have these notices been lost or otherwise; have you any of them?

A. I didn't have any, because when they were put up they were torn down. They were torn up two or three times, and we would put them up again and they would be taken down.

Q. How did Mr. Keane get into the premises—what would he have to do to get into the premises?

A. Well, I hired six men to stand up there and watch for him and tell him not to come and take down the fence, and Mr. Keane, he came out there with, I think, about fourteen men——

77 Mr. ANDREWS: I think that is immaterial.

A. I told my men——

Mr. ANDREWS: I understand the issue to be simply that the defendant is claiming this land, and it is no matter how he got possession. This is not an action for forcible and unlawful entry and detainer. Such an action was pending in the justice's court and was disposed of at the time of the commencement of this action. I think it is entirely immaterial.

The COURT: It is understood that in the trial of the main issue we are to pass on the contempt of court matter. Is that correct, gentlemen?

Mr. ANDREWS: I didn't suppose that we were paying any attention to the contempt business.

Judge JACOBS: We don't ask you- honor in this proceeding to pass upon the contempt matter at all.

The COURT: I think we had better co-fine ourselves right to the issue before us.

Cross-examination.

(Mr. ANDREWS:)

Q. When did you commence living on this land?

A. Three years ago.

Q. You never moved onto it until you moved into this last new house?

A. No, sir; I did not live on it, but we put a good deal of improvements on it the first time he came there.

Q. You didn't live on the land, then, until you moved into this new house?

A. No, sir.

Q. Something like three years ago?

A. Yes, sir; something like that.

Q. Now, do you know where the lines of this forty-acre tract are?

A. Yes, sir; I think I do.

Q. You think you do?

A. Yes, sir.

Q. You have seen them pointed out a good many times, have you?

A. Yes, sir; I have.

Q. Now, the great body of your improvements were not on this forty-acre tract, were they?

A. You will have to put your questions plainly. I cannot talk the language very well.

The COURT: You may put leading questions if you desire.

Q. I will ask you where your improvements were made, whether on this forty acres or on another piece of land.

78 A. Well, the improvements we had we expected, as on this 40 acres.

Q. You had 160 acres there, didn't you?

A. I had 40 of water front.

Q. Let me ask you how many acres were embraced in the deed got from Mr. Ross—that your husband got—how many acres were there in that deed?

A. I could not. A. I could not really tell you.

Q. Was there about 160 acres?

A. I would not say that I am sure. I have a man to look after my things.

Q. Do you know where the line of the old Holgate claim was?

A. I don't know anything about Holgate's claim.

Q. Do you know or can you describe to the court the land upon which your dwelling-house stands?

A. I could not tell you that now.

Q. Well, now, is this water-front property which you speak of, is it part of this 40 acres?

A. No, sir.

Q. Your improvements are on the water-front property?

A. No, sir; there is some other improvements. There is no dispute about that.

Judge JACOBS: That is our case, your honor.

Mr. ANDREWS: If your honor please, on the objections already made to the introduction of the evidence and without attempting to argue the points at this time, I move for a nonsuit upon the grounds that the testimony shows that the plaintiffs at the time of the commencement of this action were not the owners in fee-simple or otherwise of the land in controversy; upon the ground that the conveyance executed by Daniel Bagley to John Ross was not a conveyance

of sale of the lands in controversy to John Ross; upon the ground that there has been no proof of a sale, *bona fide* or otherwise, from the authorities pointed out by the Territory of Washington to John Ross or any grantee, and upon the further ground that it does not appear at the time of this conveyance or pretended conveyance that the ground or land was public land such as might be selected or sold.

The COURT: Motion denied. Exception allowed.

79 Defendant offered the following testimony:

Mr. ANDREWS: We offer in evidence, if your honor please, a certificate from the register of the United States land office at Olympia, showing the homestead filing of Lemuel J. Holgate on the land in question on the 26th day of June, 1863, and the cancellation of the application on December 20th, 1871, by the Commissioner of the General Land Office.

Mr. HILL: We object as immaterial, being entirely willing to withdraw the objection if it shall appear what materiality there is in it.

The COURT: Make your offer showing your purpose.

Mr. ANDREWS: We offer this in evidence for the purpose of showing that *the* the time of this sale or the alleged sale to John Ross that the land was property in such a way as that the sale could not operate upon it, and there could not be any such sale or selection of land as plaintiffs claim.

The COURT: To be followed by other proof?

Mr. ANDREWS: Yes, sir; I think we will follow it by other proof. We will follow it hereafter by proof that Keane filed his homestead application upon this land, and we will follow it by other proof from the Commissioner of the General Land Office that the land was in fact vacant up to that time—reserved, I mean.

Mr. HILL: The statement of counsel that he will follow this with proof, of course, may cure what appears to be an objection upon its face, but it does appear that this homestead was of no value at the time of commencing this action. It was cancelled in 1871, Dec. 20th.

(Argument by counsel.)

Mr. ANDREWS: We offer it for every purpose for which it is legitimate proof.

The COURT: The question before us is the admission of testimony under the sweeping offer. We would sustain the objection, but we will admit this certificate for the purpose of showing that on the 26th day of June, 1863, or rather we will admit it for the purpose of showing that there was a homestead entry upon the land.

80 The legal effect of such evidence is another proposition. We admit it simply for that purpose.

Mr. HILL: We except.

The COURT: Exception allowed. We want to say so that there may be no misunderstanding on the legal view of it. We want, in connection with this, also to say that the paper, as submitted to us,

shows that it was cancelled in December, 1871; that shows on the face of it. We are not governed, nor can we be governed, except by what appears before us as proper evidence. We admit it and will pass upon the effect of it when we have all the evidence before us.

(Paper received and marked Defendant's Exhibit No. 1.)

Mr. ANDREWS: I ask an exception to the limitation placed upon the admission. We want it admitted for all the purposes for which we have asked.

The COURT: Yes, sir.

81 GARDNER KELLOGG, a witness called on behalf of the defendant, after being duly sworn testified as follows:

(Mr. ANDREWS:)

Q. Your name is Gardner Kellog?

A. Yes, sir.

Q. Were you auditor of King county in 1864?

A. Yes, sir.

Q. 1864 or 1865?

—. I do not remember the exact date. I think 1864.

Q. What time in 1864 were you county auditor?

A. I think the election came in June, 1864.

Q. Were you, then, auditor of King county in March, 1864?

A. I cannot say as to the date, I am sure. That is a matter of record.

Q. What is your best recollection as to when you were elected?

A. Well, I cannot recollect the exact date. I was elected county auditor.

Q. At the time you were elected county auditor do you remember whom you succeeded?

A. I think I succeeded Samuel Cooms.

Q. Mr. Kellogg, have you had occasion to examine the records of King county with reference to a certain deed or alleged deed from Daniel Bagley to Mr. John Ross?

A. I think my attention was called to that some months ago.

Q. Do you know whether or not the deed was recorded by you from your recollection of that examination?

A. I think so.

Q. Your recollection is that the deed was recorded?

A. Yes, sir; the deed was recorded by me.

Q. Was the deed recorded by you as county auditor or as deputy?

A. As county auditor, that is my recollection. I never was deputy.

Q. You never were deputy?

A. No, sir.

Q. You were not deputy under Cooms?

A. No, sir.

Q. Then if the deed was recorded by you it was recorded by you while you were auditor?

A. Yes, sir.

Q. Did you say that you had examined the records of the county lately?

A. I think my attention was called to that and I went to the auditor's office some five or six months ago. I think the record was shown to me. As to the particulars I could not state.

Q. Do you recollect in whose handwriting the record of the deed is?

Mr. ANDREWS: These are records that cannot be brought here.

The COURT: We are very strong of the impression that
82 these records can be produced in this court. We have not made that ruling, but we are very strong of that impretsion.

Mr. ANDREWS: We ask for a *subpœna duces tecum* to produce volume 1 of deeds.

That is all for the present.

83 JOHN KEANE, defendant, after being duly sworn, testified as follows:

(Mr. ANDREWS:)

Q. You are defendant in this case?

A. Yes, sir.

Q. Have you any paper with you of any filing in the United States land office?

A. I presume my counsel have.

Q. You may look at this paper, Mr. Keane. (Paper handed witness.) What paper is that?

A. That is a certificate of the receiver's receipt.

Q. Of filing?

A. For my homestead filing on the southwest quarter of the northwest quarter.

Q. Is that the land in controversy in this case?

A. Yes, sir.

Mr. ANDREWS: We propose to offer this in evidence.

Mr. HILL: I do not think that we can object to that.

(Paper received in evidence and marked Exhibit No. 2.)

Mr. ANDREWS: This is the homestead filing, dated October 20, 1888.

Q. Are you in possession of that land?

A. Yes, sir.

Q. Have you been living there ever since the filing of that paper?

A. Yes, sir.

Q. Your family there?

A. Yes, sir.

Cross-examination.

(Mr. HILL:)

Q. You have made that your residence all the time, have you, Mr. Keane?

A. Yes, sir.

Q. What time did you go there?

A. I got my receiver's receipt on the date mentioned in the receipt, the 20th of October, 1888, and took up my residence early in February.

Q. Of what year?

A. 1889.

Q. Had you been on that land before February?

A. I had.

Q. Been stopping on it any?

A. I took possession of it and was doing work on it.

Q. You took possession of it and did some work clearing?

A. Yes, sir.

Q. When did you take possession and begin work clearing?

A. Very soon after my homestead certificate was issued.

Q. Had you done anything before that?

A. I was upon the land before that, but never made any improvement until I got my receiver's receipt.

Q. Was the land all uninclosed when you went there to take possession of it?

A. No, sir; part was inclosed.

Q. Did you go inside the enclosure?

A. I did, sir.

84 Q. Built your place inside the inclosure?

A. Yes, sir.

Q. Whose enclosure was it?

A. It was mine, sir.

Q. How did you get it—by virtue of the homestead laws of the United States?

Q. Under and by virtue of the homestead laws of the United States?

A. Yes, sir.

Q. You did not make the fence?

A. I did not make the fence; no, sir.

Q. You did not make the barn that was on the place?

A. No; but the barns were made of lumber that grew upon the place.

Q. Did you see it made?

A. I won't say that of my own personal knowledge.

Q. You did not build the house that was on the place at that time?

A. Which house do you refer to?

Q. The house that Brygger was living in.

A. No, sir.

Q. The Brygger house is on this place?

A. I understand a small corner is across the line of my claim.

Q. Brygger was living there at the time that you went there?

A. So I believe.

Q. You knew it at that time, did you not?

A. I knew what?

Q. You knew Brygger was living there then, did you not?

A. I don't know that I do. I never saw the man to my knowledge.

Q. You never thought of it?

A. I never saw him.

Q. You knew somebody had it enclosed?

A. I presumed the enclosure did not grow naturally.

Q. You presumed that the enclosure did not grow naturally, and you also found there was an orchard on part of the place?

A. No, sir.

Q. Were there no fruit trees on it?

A. No, sir; not that I know of now.

Q. Were there none then?

A. Well, if there was, I failed to see it.

Q. Were there or not, Mr. Keane? You know; were there any fruit trees on that ground? On your oath, state.

A. If there was at that time I failed to see them.

Q. If there was at that time you failed to see them?

A. Yes, sir.

Q. Now, Mr. Keane, do you swear that there might have been an orchard on that ground and you failed to see it?

A. I do not believe there is any orchard there now. I do not believe there is an orchard there at any time.

85 Q. Are there any fruit trees at all there?

A. Not that I saw.

Q. Are there any now?

A. Not that I know of. There may be a few in the immediate neighborhood of the house.

Q. There might be a few in the immediate neighborhood of the house on that piece of land?

—. Not exactly on that piece of land. There are a few outside.

Q. And none on it?

A. Well, I will not swear positively as to whether or not there may be at the present time a few fruit trees.

Q. Will you swear positively that there were none there at the time that you went there?

A. I won't. If there was, I did not see them.

Q. Will you swear there were not any?

A. If there was any there, perhaps I would not see them.

Q. No shrubbery. You did not see any shrubbery on the place?

A. Positively, I did not pay any particular attention to that.

Q. How did you get into that enclosure?

A. By climbing across; by stepping across.

Q. Did your wagon step across it also when you went to haul your stuff in?

A. No; the wagon did not step across.

Q. How did the wagon get in?

A. There were a few logs or a few old shrubs, something like that, in the way—kind of a brush fence.

Q. That was removed by you?

A. By my order.

Mr. ANDREWS: I submit that this is not material as cross-examination. I object therefore.

The COURT: Objection overruled; exception allowed.

Q. You said part of this place was inclosed. How much of it was inclosed?

A. I did not measure it to know.

Q. How much; can you state approximately?

A. I don't know that I can.

Q. Was there more than a quarter of an acre enclosed?

A. There was.

Q. More than ten acres?

A. There might have been.

Q. Was there more than fifteen acres?

A. I could not tell you.

Q. You cannot tell?

A. No, sir.

Q. There might have been more than ten acres, but you cannot tell that there were more than fifteen. How large a piece was enclosed; all this forty acres?

86 A. That is more than I can tell you.

Q. Never looked at it?

A. I did, sir.

Q. Are you a farmer?

A. Well, I have been in my earlier days.

Q. What are you now?

A. I am now, too.

Q. In your earlier days and now, too? Now, can you look over a piece of ground and tell approximately as to how large it is?

A. I cannot tell you, sir. I cannot tell how large or small, for the reason that I am not a surveyor. I cannot give you even an approximate idea.

Q. Accustomed to look over ground as you have been, you swear now you don't know there is more than fifteen acres of that forty enclosed?

A. I did not swear anything of the kind.

Q. Do you know, then?

A. I don't know.

Q. What I say is do you swear you don't know whether there is more than fifteen acres enclosed?

A. I do not.

Q. You do not swear. What is the fact—whether there is more than fifteen acres enclosed?

A. It is just as I have stated to you before—I haven't measured it and don't know.

Q. Do you know approximately whether there is half of the forty acres enclosed or not?

A. There may be.

Q. Do you know with approximate correctness whether there is three-quarters enclosed?

A. I do not think it.

Q. You do not think there is quite three-quarters. About what proportion is enclosed?

A. There is a fence on about two sides and on the other side there is no fence.

Q. There is a fence on two sides and on the other side there is no fence?

A. Yes, sir; there are two or three small patches that have got a fence around for gardens or something of that sort.

Q. Who has a garden there?

A. Well, I suppose Mrs. Brygger had.

Q. Is this the condition in which it was when you found it?

A. About the same.

Q. There were then two large pieces that might have had fifteen acres, more or less, in it besides some little pieces used for a garden, all inclosed?

A. No; there was not a large piece enclosed, for the reason I state to you. It might have been enclosed on two sides to some little extent, but it was not a perfect enclosure by any means, and the other side remains at the present time unenclosed.

Q. Entirely open?

A. Yes, sir.

87 Q. Nothing at all to obstruct entry to it?

A. Nothing at all that I know of in the shape of a fence around it.

Q. What side was that that was unenclosed?

A. The west side.

Q. That was next to the water, was it not?

A. No, sir.

Q. Was it not?

A. It is next to the John Schweitzer homestead, a part of the original homestead that has been patented to John Schweitzer.

Q. Schweitzer's place was the obstruction to people from getting in there?

Q. That is about all I know of.

Q. They could not get into that without going through the Schweitzer place?

A. I don't know that there is any fence between them.

Q. I say they could not get on the forty at the uninclosed side without going across Schweitzer's?

A. Who could not?

Q. Stock, sheep, cattle.

A. I don't know.

Q. They would have to go through Schweitzer's to strike the uninclosed part of the land?

A. Yes, sir.

Q. Schweitzer's place is fenced?

A. It was fenced. I don't know whether it is now.

Q. Well, was it fenced when you went there?

A. I could not say.

Q. You did not look to see, and you could not say whether any fence was on Schweitzer's or not?

A. No, sir.
Q. Was there any there?
A. There was; one small part of it.
Q. What part, the upper or the lower?
A. Well, there was a kind of brush fence.
Q. Kind of a brush fence to keep stock and things from straying in?
A. Yes, sir; but it was burned up by the fire.
Q. When?
A. Well, I suppose some years ago.
Q. How many years ago?
A. That is more than I can tell you.
Q. After you went there or before?
—. It was not; it was about a year ago, and but little remains of that brush fence.
Q. That was burned a year ago—the brush fence?
A. Yes, sir.
Q. When you went on that ground you were notified by Brygger that it was his land?
A. No, sir.
Q. Were you notified by anybody that Brygger claimed it?
A. No, sir.
Q. You w-re not?
A. No, sir.
Q. You did not know the Brygger claimed it?
A. Not until away in the spring of 1889.
88 Q. What time in the spring of 1889?
A. In February, I believe.
Q. You only went there in February?
A. Oh, yes; I went there before.
Q. Did you not swear to this court that you did not go there and enter into possession until February, 1889?
A. I did not swear to anything of the kind. I swear I was on the land before making improvements.
Q. You went upon it and walked upon it, but when did you go into it to take possession?
A. When I commenced to make improvements.
Q. That was before the issuance of your land office certificate?
A. Very soon after.
Q. So it was some month and a half or something like that or about that same time that you found that Brygger claimed it?
A. No, sir; I did not find that Brygger was claiming it. I had no notice of Brygger claiming it at all until after I was living on the land.
Q. When did you go to live upon the land?
A. February, 1889.
Q. How did you find out that Brygger was claiming it?
A. Mr. Schillestad came and told me that Brygger claimed it.
Q. Mr. Schillestad came and told you that Brygger claimed it?
A. He told me that Brygger claimed it, and that he claimed it as

the executor of Mr. Brygger's estate, to protect the interests of that estate. He did not tell me further about that that I remember of.

Q. And so you begun to put up a house and were enjoined?

A. After I put — the house I was enjoined.

Q. You had not finished it?

A. Not as it is now.

Q. Not as it is now?

A. No, sir.

Q. You have not put up any more improvements?

A. Only what was absolutely necessary.

Q. You have let your stock run at large on the place?

A. I have two cows there and two calves.

Q. And two calves?

A. Yes, sir.

Q. And had *then* there ever since February, 1889?

A. No, sir.

Q. When did you get them there?

A. Some time last fall.

Q. Did you have any stock in there before?

A. No, sir.

Q. You pulled down the fence to go in with your wagon?

A. I have stated that there was some kind of a fence there.

89 Q. Whatever fence there was there, you pulled it down?

A. Yes, sir.

Q. You pulled it down from time to time in going back and forth?

A. No, sir; I put a fence there.

Q. When?

—. Very soon after I commenced to live there upon the place. I rebuilt the fence.

Q. You rebuilt the fence?

A. Yes, sir; better than it was before.

Q. You rebuilt it better than it was before all around the place; built it all around wherever it was down?

A. No; wherever I had anything to do with it. I rebuilt it better than it was before. It was only that one particular place.

Q. What do you mean by that, wherever you had anything to do with it?

A. I mean at that particular point.

Q. Wherever you pulled it down you rebuilt it better?

A. Yes, sir.

Q. Mr. Keane, you have exhibited your receipt. Your claim was rejected finally, was it not?

A. No, sir.

Q. It was not?

A. Not that I know of.

Q. Do you say that your claim—your homestead—was not rejected?

A. Not that I know of.

Q. Haven't you received notice?

A. No, sir.

Q. Did you not appeal from the decision here rejecting it?
A. Explain yourself, please.
Q. Did you not appeal from the decision of the land office at Seattle rejecting your claim?
A. The land office at Seattle notified me that they would recommend my homestead entry for cancellation.
Q. They would hold it for cancellation?
A. Yes, sir.
Q. And you appealed, did you not?
A. Yes, sir.
Q. And you have been notified that your appeal was dismissed, have you not?
A. No, sir.

Mr. ANDREWS: I do not think that is cross-examination.

Q. You have not been notified?
A. Excuse me for one moment——

Mr. ANDREWS: I object. It is not cross-examination.

A. Excuse me for one moment. I have not been notified from the Land Department other than by a letter which I saw within one week in the land office here that some kind of a decision had been rendered, but service of that decision has never been made upon me that I know of. It is only within one week that I saw the letter in the land office in Seattle that some kind of a decision had been made, but that decision has never been served upon me nor notice of it.

90 Mr. ANDREWS: We move to strike out the testimony of the witness on the questions asked if he had appealed from any decision, whether his filing had been set aside, because it is irrelevant and immaterial and not cross-examination.

The COURT: We will strike out the latter part of his cross-examination—the answer of Mr. Keane as to the notice of appeal and the action of the Land Department on the appeal. That portion you move to strike out.

Mr. ANDREWS: Also the action of the department in notifying him that they held his homestead application for cancellation.

The COURT: That relates to the same question. We will strike it out.

Mr. HILL: We except.

The COURT: Exception allowed.

Redirect examination:

Mr. ANDREWS: Are you a citizen of the United States?
A. I am, sir.
Q. How long have you been so?
A. I took out my citizen papers in 1875, I think it was.

Mr. HILL: We object. That can be proved another way.

Q. Have you your naturalization papers with you?

A. I have them, but not on my person. I cannot produce them now. I can produce them in court tomorrow; at least, I saw them a day or two since.

Mr. ANDREWS: We ask leave to file them tomorrow.

The COURT: Before we get through with the case; we will not hold the case open for that. If you produce them before the testimony is closed we will permit you to introduce them.

Q. Are you the head of a family?
A. Yes, sir.
Q. What is your age?
A. Very close to fifty; between forty-eight and fifty years of age.

(Mr. HILL:)

Q. You were not born in the United States?
A. No, sir.

(Mr. ANDREWS:)

Q. Did your parents come to the United States with you?
A. No, sir.

We wish to show the deed that has been offered in evidence as apparently recorded by Mr. Gardner Kellogg as county auditor. The record of the date shows it was on the 4th of February, 1864, and the other records show that Mr. Kellogg became auditor,
91 as he testified, some time in June or July, 1864, and the deed is recorded among a lot of other deeds dated February, 1865, and among the record of deeds in 1865.

Q. We will admit that. I have no doubt that it was in 1865.

The COURT: If you can agree upon the fact that will save time.

Judge JACOBS: We are willing to admit that.

The COURT: Let the stenographer take down what you propose to prove by the witness.

Mr. HILL: We object to that as immaterial; but if it is attempting to show that this deed was recorded in 1865 itself, then that becomes something in the case, if counsel says it — for that purpose.

The COURT: Give us the purpose, and possibly we can save time.

Mr. ANDREWS: I think that would be the full purpose, to show when it was recorded.

Mr. HILL: We will admit that the record was made in 1865, not 1864.

Mr. ANDREWS: I propose to show by Mr. Kellogg that he was not auditor in February, 1864.

The COURT: They admit that it was 1865 instead of 1864.

Mr. ANDREWS: We now offer in evidence, if it should be thought material, a letter from the Commissioner of the General Land Office of June 26th, 1882, to the register and receiver at Olympia in relation to the condition of the Holgate homestead, and also the letter of the register and receiver properly certifying the letter.

Mr. HILL: We object to this as both immaterial and incompetent.

The COURT (after argument by counsel): We have some doubt as

to the admissability of this paper, but we will give you the benefit of the doubt and admit it. Exception allowed.

(Paper admitted and marked Exhibit 3.)

We offer a certified copy of the alleged deed from Daniel Bagley to John Ross, together with the certificate of W. R. Forrest, the county auditor of King county.

Mr. HILL: We object to it, if the court please. The deed itself is immaterial. It is immaterial and not a part of the defence. This is the same deed we have introduced.

The COURT: What is the object if it is in evidence?

Mr. HILL: He has attempted to certify as to the condition his books stand as to other matter. He must be examined as any other witness.

92 The COURT: What is the purpose of this offer?

Mr. ANDREWS: I do not think we have any other purpose than to show the fact that is certified there.

The COURT: The fact that you want to get at is that his deed was recorded February 4, 1865, instead of February 4, 1864.

Mr. ANDREWS: My client seems to be of the impression that the deed was not made in 1864, and that this testimony tends to establish that fact, and it may be material.

The COURT: We have the fact admitted that the deed was recorded in February, 1865, instead of February, 1864. We have this admitted here and this would not make it any stronger. We will sustain the objection, if that is the only purpose for which it is offered.

Mr. ANDREWS: We will ask an exception.

The COURT: Exception allowed.

Mr. ANDREWS: Having offered the paper, we will ask that it be made a part of the record, so it will show that it is rejected.

The COURT: If necessary, it can go up to the court above.

93 Mr. LEMUEL J. HOLGATE, a witness called for the defendant, after being duly sworn, testified as follows:

(Mr. ANDREWS:)

Q. State your name to the court.

A. Lemuel J. Holgate.

Q. Mr. Holgate, where did you reside in 1863?

A. I resided on Salmon bay, on a piece of land that I filed on, I think.

Mr. HILL: I object. The filing should be of record.

Q. I will ask you if you didn't have a homestead claim, if you are the same Lemuel J. Holgate that filed on the southwest quarter of the northwest quarter of section 11 and lots 1 and 2 of section 10, town. 25 north, of range 3 east.

A. I am, I believe. That is the description of the land I filed on as a homestead. Of course, it is so long ago that I haven't all the

figures and everything positively in my mind, but I believe that is the correct description of the land I filed on in 1863.

Q. Mr. Holgate, have you that certificate of filing with you?

A. No, sir; I have made some moves since that time, and in removing from there I was swamped in the bay and lost a good part of my household goods, and then another time when I was absent from home in the winter there was some papers and books that got misplaced or out of the way by parties in the house, and I haven't all of the old papers I had in connection with land claims, land that I held at different times. I haven't any of the papers in my possession relating to that homestead claim, and haven't had for several years, that I know of.

Q. Now, Mr. Holgate, were you living upon this land as a homestead claim in the month of March, 1864?

A. Yes, sir.

Q. Were you there the whole of that month?

A. Well, I cannot say about being personally on the land.

Q. I don't mean that. Were you living there? Was that your home at the time?

A. Yes, sir; my mother lived with me. We kept house, to my recollection.

Q. How long did you continue on the land, Mr. Holgate?

A. To the best of my recollection now, it was, I think, about December, 1864, that I abandoned that claim, or the fore part of 1865. My recollection now is—I haven't got the record to refer to. It was in December, 1864. It was the latter part of 1864 or the fore part of 1865. That is the best of my recollection.

94 Q. Now, you say that you abandoned it; what do you mean by abandoned the place, Mr. Holgate?

A. I left that piece of land and took up a residence upon a piece of land that I bought on White river. I bought that by deed; I got it by deed. I had concluded to remove from the land on Salmon bay when I left there.

Cross-examination:

Mr. HILL: Mr. Holgate, might it not have been the latter part of 1863 or the early part of 1864 that you left?

A. My impression is that it was the latter part of 1864 when I left the land.

Q. You executed a paper of relinquishment, did you not?

A. I cannot recollect now whether I did or not.

Q. Let me show you a paper for you to examine, and then see if it will refresh your mind.

A. Of course, 25 years ago, a man might do a great many little transactions that I haven't thought of since.

Q. Look at this document and see if it refreshes your memory as to any fact about your making a relinquishment.

(Witness examines paper.)

Q. What do you say now, Mr. Holgate, as to whether it was the early part of 1864 that you left there?

A. Well, I will say that it might not have been as early as December or it might have been later, but it was in that winter. My recollection of it is that it was in the fall or some time in the winter of 1864 that I moved from there.

Q. It might have been in February, 1864?

A. It might have been; I won't say that it was not that late.

Q. Well, your impression now is that it was in the fall or winter of 1863 or 1864?

A. No; my impression is that it was in 1864 or 1865 when I left there.

Q. What time was it in reference to the time you got your deed out on White river? Did you go there since you got the deed from White river, *that* you left the place?

A. No, sir.

Q. How long had you had that White River property before you abandoned the place down there?

A. Well, I cannot recollect; some several months, I think.

Q. Did you sell that claim down there to anybody?

95 A. Yes, sir.

Q. To whom did you sell it?

Mr. ANDREWS: We object as immaterial.

The COURT: It is cross-examination as to the time that he left there. We will admit it. Exception allowed.

A. Mr. John Ross.

Q. You sold it to John Ross?

A. Yes, sir.

Q. Did you know that John Ross afterward lived there?

A. No; I did not.

Q. You sold it to John Ross?

A. Yes, sir.

Q. Whom did you buy from, your place up there on White river?

A. Catherine Brownell, of Massachusetts. I bought the homestead of her.

Q. Whose claim was it?

A. The donation claim. She was heir of Henry Neider, who filed a donation claim on that in 1854. About six months afterward the Government issued a patent to her as his heir.

Q. If you executed any instrument of writing, do you not know what become of it, and have no knowledge now where it is?

A. No, sir.

Redirect examination:

Mr. ANDREWS: Did you execute any instrument of writing at the time of leaving this place?

A. I cannot recollect now whether I did or not.

Q. You do not recollect that you did?

A. No, sir; I do not. There was an agreement by Mr. Ross. I received a consideration; whether I executed a written—it has been so long it has slipped my mind and I cannot tell positively.

Q. The agreement between you and Ross was for the improvements, was it not?

A. Well, it was the land and improvements, whatever right, title, and claim that I might have had to the land or its improvements.

Q. How long did you live on that place after you filed your homestead claim?

A. I am under the impression that I lived something like a year and a half.

Q. That is your best recollection, is it?

A. My best recollection.

Q. Do you think that you lived more than six or seven months on the place?

96 A. Yes, sir.

Q. If, then, your filing was on the 26th of June, 1863, could you have moved away in 1864, in February?

Mr. HILL: That is leading, very leading, and, in the next place, he is asking the man whether he could have done so or not.

Q. How soon after you filed on it did you move on the place, Mr. Holgate, if you remember that?

A. I think I was residing—my recollection is—I was residing on the place at the time I filed on it.

Q. You had had already a pre-emption filing on it, had you not?

A. Yes, sir.

Q. Now, do you remember the date of the deed to the White River property?

A. I can hardly recollect positively whether I got the deed in 1863 or 1864.

Q. When did you say the donation claimant died, Mr. Neider?

A. My recollection is that he died about six months after he filed on the donation claim on White river.

Q. Do you know when he filed now; can you state?

A. It was some time in 1864.

Recross-examination:

Mr. HILL: And you say you had had a pre-emption on this ground before filing the homestead?

A. I had pre-empted it and changed it to a homestead.

Q. You were living on it when you filed your homestead?

A. Yes, sir; that is my recollection.

Q. How long had you been living on it?

A. Something over a year, I think.

Q. And you were there altogether something over a year and a half?

A. Well, I was there most of the time after I filed my pre-emption. I was a portion of the time on the place that I rented from Mr. Carr across the bay. I was on that some portion of the time. I don't recollect how much, but I was careful, I recollect, to live up to my pre-emption and homestead filings to make them good, because I expected then to make a permanent home right along.

Q. Then you counted your residence under the pre-emption and homestead something over a year and a half?

A. Yes, sir.

Q. How much over a year and a half would you say?

A. I would say, now I should think, about two years and a half probably; possibly more.

Mr. ANDREWS: We rest.

97 *Rebuttal.*

Mr. HILL: We offer in evidence in rebuttal the record of the land department of date March 14th, 1890, certified by the register of the land office at Seattle, showing the cancellation of the entry of John Keane on this land.

Mr. ANDREWS: We object to it, if your honor please, first, because it shows cancellation to be subsequent to the commencement of this action.

We have rested our case, but I have neglected to put W. H. White on the stand to testify to one thing that I had intended to offer.

Mr. W. H. WHITE, a witness called for the defendant, after being duly sworn, testified as follows:

(Mr. ANDREWS:)

Q. Mr. White, are you acquainted with this list No. 2 of the University of Washington?

A. Yes, sir.

Q. How long have you lived in the Territory of Washington and State of Washington?

A. Since the year 1871, with the exception of about one year, in 1873.

Q. Mr. White, were you at the land office at Olympia when there was a contest with reference to this list No. 2 of this land in controversy?

A. Not this particular land in controversy, but list No. 2 embracing some land that Mr. Schweitzer, I believe, had a claim. I do not know the particular piece of land here in controversy, but a piece of land that Schweitzer had down here near Salmon bay—a piece of land up here near Renton, on Black river. A German had taken a piece of this university—what was claimed as university land, embraced in same list No. 2, up here near Black river. Henry L. Yesler, if my recollection serves me right, claimed that land and a contest was being had before the register at Olympia. I forget the German's name; Charley Stohl, I believe, and I am not sure whether I was an attorney in the matter or not. My recollection is that Mr. Daniel Bagley was there conducting the examination of the witnesses for the persons who were claiming under the university title. It was in Olympia, in a house, I think, that Robert Stuart, the register of the land office, owned. The land office was at that time—my recollection is that the register's office was on one side of

the street and the receiver's office on the other side of Main
98 street, where the Stuart's lived, and the contest was being held, if my recollection serves me right, in the receiver's office there.

Q. What time was that?

A. Well, it was so long ago that I cannot fix the date.

Q. Well, was it in the '70's or '60's?

A. Well, I know this fact, that it was after Mr. John Schewitzer filed on his land.

Q. Now, Mr. White, did anything occur there that attracted your attention?

A. Yes, sir; there was a good many things that attracted my attention.

Q. With reference to this last No. 2?

Mr. HILL: We object, if the court please. The proceedings there can only be proved by the record there. I don't know, there may be something that counsel has in mind that he wishes to get at, but I cannot imagine how this is material. It cannot be competent to prove the proceedings in this way.

The COURT: Counsel may make his offer.

Mr. ANDREWS: We offer to prove by this witness that during this contest it became necessary to inquire into the condition of list No. 2, and some inquiry was made for the list by the register, and the list was produced by Mr. Bagley, and the register inquired, Where has that been? I have been looking for it for a long time, or words to that effect, proving in this manner that the list was not in the land office. I am not so certain that the witness will testify in this way. I will ask Mr. White if he will testify to it before I make the offer.

Mr. WHITE: Not just that, but substantially.

Mr. HILL: We object to that.

Mr. ANDREWS: I offer to prove by this witness that at that same time the register declared that that was the first time he had seen that list, or that that was the first time he had any knowledge of it. I cannot say which.

Mr. HILL: I object to that as both immaterial and incompetent.

Mr. ANDREWS: Before your honor rules I want to offer also to prove that the list No. 2 was filed in the United States land office at that time for the first time.

Mr. HILL: That cannot be proved in this way.

The COURT: The latter part of the offer might be material, but by this witness is another proposition. We will sustain the ob-
99 jection and allow an exception. We will permit you to prove the latter by the proper officer.

Continuation of Rebuttal.

Mr. ANDREWS: My objection is that this matter has been decided after the commencement of the action.

The COURT: Objection overruled. Exception allowed.

(Paper marked Exhibit E.)

At this time further proceedings were adjourned until June 19, 9.30 a. m.

100 Continuation of proceedings pursuant to adjournment June 19th, 1890, 9.30 a. m.

Mr. HILL: I offer in evidence the decision of the Commissioner of the General Land Office holding Mr. Keane's homestead entry for cancellation, bearing date June 28th, 1889; and being the same paper referred to in the last exhibit we offered.

Mr. ANDREWS: No objections except those already made.

The COURT: According to my notes that was offered in evidence upon the cancellation of John Keane's homestead, dated the 14th of March, 1890, and there was an objection made and Mr. White was called and it was ruled upon. The only question is whether I had passed upon the objection.

Mr. HILL: The paper that I offer is the decision from which the appeal was taken, dated January 28th, 1889.

Mr. ANDREWS: We object, as we have already objected to the same offer.

The COURT: Objection overruled. Exception allowed.

(Paper received and marked Exhibit H.)

Judge JACOBS: We have one or two more documents to file and the copies of the letters of administration.

Mr. HILL: They were brought in and filed.

101 Mr. DANIEL BAGLEY, a witness called for plaintiff, after being duly sworn, testified as follows:

(Mr. HILL:)

Q. Are you the same Daniel Bagley who was formerly one of the commissioners for the selection and sale of university lands in this State?

A. I am.

Q. Do you recollect of the occasion of your selling the land in controversy here to John Ross?

A. I do.

Q. I will ask you to state if you know Mr. Lemuel J. Holgate.

A. I do.

Q. I will ask you to state what, if anything, you know as to the relinquishment by Mr. Holgate of the land to Mr. Ross.

Mr. ANDREWS: If your honor please, we wish to object to any testimony as to what Mr. Bagley may know as to that relinquishment. If there was such a relinquishment as the land office could take notice of, it must have been in writing, and if that is in writing that must be the best proof, and I shall insist upon the production of that proof.

Mr. HILL: I may state to the court that I intend to present by the witness that he had the relinquishment in his hands before he sold

to Mr. Ross, and that he filed the relinquishment himself in the land office. I am not asking the contents of the paper.

The COURT: Objection overruled. Exception allowed.

Q. You may state, Mr. Bagley, whether you saw the relinquishment.

A. I saw the relinquishment before I filed the selection in the land office and before I sold to Mr. John Ross.

Q. Do you know what became of that relinquishment?

A. I filed it or had it filed in the land office at Olympia.

Cross-examination:

Mr. ANDREWS: Mr. Bagley, you say you had this relinquishment filed or else filed it? Can you say which?

A. I would not swear positively. I think I filed it myself.

Q. That is your recollection at this time?

A. Yes, sir.

Q. But on that subject enough to swear?

A. Well, I will swear I know it was there.

Q. The question I ask you is if you filed it?

A. I said in the beginning I would not say positively, but
102 it is my impression that I filed it or had it filed.

Q. Now, did you have it filed or file it?

A. Well, it is—may I be a little diffuse in my statement?

Q. If you had it filed, of course you know who filed it?

A. No; I do not, unless I filed it myself. I think I filed it.

Q. You were at the time commissioner of the university?

A. I was; I went to the office a great deal.

Q. You went to the land office a great deal?

A. I was there a great deal.

Q. In constant communication with the land office?

A. Yes, sir.

Q. And it is your impression from your course of conduct that you filed it there at that time?

A. Yes, sir.

Q. But do you know that you did file it; you cannot swear positively that you did file it?

A. It is just as I said.

Q. And if you did not file — you cannot say who filed it for you?

A. No, sir.

Q. Mr. Bagley, what date did you see that relinquishment first?

A. Well, my impression is that I saw it some time in the first part of March, and my impression is very strong that I sold the land after I saw the relinquishment. I am certain of that.

Q. Now, how long before Mr. Holgate moved away from that land was it that you saw the relinquishment?

A. I won't say that, but I don't think he was on the land at the time.

Q. You think he moved away, don't you?

A. Yes, sir; I do.

Q. He didn't mean to move away?

A. He was a single man and was away.

Q. Well, you do know, don't you, that Mr. Holgate at one time moved his household effects from that land?

A. No; I don't know that.

Q. Don't you know that he was living with his mother down there?

A. Well, I knew he was living with his mother or his mother with him, I don't know which.

Q. It was a matter of general reputation?

A. Yes, sir.

Q. Now, was it not a matter of general reputation that Holgate moved away from Salmon Bay with his mother?

A. Yes, sir.

Q. Now, you cannot say whether it was in the spring of 1864 or fall of 1864?

A. No, sir.

Q. How long, now, was it before Mr. Holgate moved away that you saw this relinquishment?

103 A. As I said, I could not swear when he did move away.

Q. According to reputation; you know by reputation about the time he moved away, don't you?

A. Oh, I don't remember the exact date; it was thirty years ago.

Q. And a man cannot swear to dates that length of time?

A. No, sir.

Q. I think, perhaps, you could say within two or three months?

A. No; I cannot.

Q. You could not say within six months, Mr. Bagley?

A. No, sir.

Q. All that you can say is that before you sold that land to Mr. Ross you saw that relinquishment?

A. Yes, sir.

Mr. HILL: We will offer in evidence a certified transcript of the deed from Catherine Brownell to Lemuel J. Holgate for a part of the donation claim of Henry Neider, the purpose being only to fix the date of that transaction, the deed being given on the 2nd of November, 1863.

Mr. ANDREWS: I think it is immaterial. We object to the introduction on that ground.

The COURT: The objection is overruled and the deed is admitted for the purpose for which it is offered and for that solely.

Mr. ANDREWS: We except.

The COURT: Exception allowed.

104 *Surrebuttal.*

JOHN ARTHUR, Esquire, a witness called for the defendant, after being duly sworn, testified as follows:

Mr. ANDREWS: You were the attorney for John Keane before the U. S. land office register and receiver and Commissioner of the General Land Office?

A. Yes, sir.
Q. In the matter of this land?
A. Yes, sir.
Q. I will ask you to look at that paper and state what it is.

Mr. HILL: I suppose the witness cannot state what it is.

Mr. ANDREWS: State when you received that paper, Mr. Arthur.
A. I received this paper some time after the 4th of April, 1889; probably the 5th or 6th I received it. I received it by regular mail, not registered mail, and I know it was after the 4th of April, after the date it bears.
Q. After what date?
A. It was after the date it bears. It bears date April 4th, 1889. I know it was after that date I received it. I received it through the regular mail, not registered.
Q. Did you have any other notice or oral notice of the decision contained in that letter than that conveyed by that letter?
A. I had not. That was the only notice that was ever sent to me.
Q. Look at this envelope, Mr. Arthur (envelope shown witness).
A. This is the envelope in which that letter came.

Mr. ANDREWS: I think the postmark cannot be read, but we offer the letter and envelope in evidence for the purpose of showing the time of service of the decision in the department by the Commissioner of the General Land Office.
Mr. HILL: I didn't catch what you said about receiving it.

A. It is dated the 4th of April. It was after that date, probably the 5th or 6th, or might have been later than that, for the reason that at that time mails in the Seattle post office were delayed a good deal by reason of great pressure of work in the office and an insufficiency of clerical force, but it was not earlier than the 5th or 6th of April.

Mr. HILL: What date do you desire to fix as the date of this notice?
Mr. ANDREWS: Oh, say the 5th.
Mr. HILL: We have no objection to having it, assuming
105 that it becomes material that he received it on the 5th.
Mr. ANDREWS: We offer this letter in evidence for the purpose of showing the time when the decision of the Commissioner of the General Land Office was served upon us.
Mr. HILL: We object to that as immaterial when the notice was served.
(Argument by counsel.)
The COURT: Overrule the objection and give you an exception.

106 T. M. REED, JR., a witness called on behalf of the defendant, after being duly sworn, testified as follows:

(Mr. ANDREWS:)

Q. What is your position?
A. Register of the United States land office at Seattle.

Q. Mr. Reed, have you a copy of the rules and regulations of the land department?

A. Yes, sir.

Q. Are these regulations in force in the office of the Secretary of the Interior and the Commissioner of the General Land Office?

A. They are.

Q. How long have they been in force?

A. These rules were first promulgated in 1885 and took effect from the first of September, 1885, and they have been revised and amendments noted in the pamphlet at various times.

Q. I will ask you to refer to rule 86 and state when that rule came in force and how long it has been in force.

A. Rule 86 has been in force ever since the promulgation of the rules of practice, in 1885, and before that also.

Mr. ANDREWS: I desire to offer the pamphlet in evidence, and especially rule 86, for the purpose of showing the practice of the department in cases such as this.

Mr. HILL: Subject to saying that it is immaterial on the trial, I have no objection to it.

The COURT: You may preserve your exception.

(Paper marked Exhibit 5.)

Q. What is the ruling of the department with reference to transmitting decisions from the Secretary of the Interior to the Commissioner of the General Land Office?

Mr. HILL: I object as incompetent.

Q. Has your office any regulation, printed or otherwise, to notify litigants of the decisions of the department?

A. There is a circular made by the department in reference to notifying litigants.

Q. Is that here?

A. No, sir; that is not in these rules and regulations.

Q. What is the practice?

A. Under the circular?

Mr. HILL: We object to the question. He says there is a circular.

Mr. ANDREWS: I suppose the objection is well taken.

The COURT: There is no doubt of it.

107 Mr. HILL: While Mr. Reed is here I would like to prove the handwriting of Secretary Teller and offer in evidence a letter of their department. I do not care to cross-examine him on any matter.

Q. Will you look at this paper and state in whose handwriting it is?

A. That paper is in the handwriting of Mr. W. H. Townsend, who was formerly clerk in the land office at Olympia, from the early part of 1883 to August, 1887.

Q. Mr. Reed, do you know anything of the destruction of the records of the United States land office at Olympia?

A. Yes, sir.

Q. When did that happen?

A. That happened in September, 1883.

Q. Now, I will ask you to look at this paper, Mr. Reed, and state whether that is a paper coming from the land office at Olympia.

A. I am inclined to think it is—in fact, I am as positive as I could be without having actual knowledge that it is.

Q. Do you know whether that class of records to which this belong- was consumed?

A. Yes, sir; a large part of them, especially the letters written during the year 1883 were consumed at that time.

Q. Have you examined your office to know whether that is there or not, whether the original is there?

A. The original of which that purports to be a copy is not in the land office at present.

Q. The office of which you are now the register is the successor in line of the Olympia office?

A. Yes, sir; I have all the records of the Olympia office except a few files that relate to the lands south of the sixteenth standard parallel—I mean fourteenth standard parallel.

Q. What was the practice of the land office with regard to—when letters of this character came from the Land Department at Washington—with regard to sending out these to parties interested?

A. The practice?

Mr. ANDREWS: Unless there is some rule we shall object.

Q. Is there a written rule on this subject?

A. I know of no written rule governing the practice at that time. The first rule that was established governing the practice fully was in October 28th, 1886.

108 Q. Then, what was the fact in regard to the informing of parties by sending out notices of decisions of that department when they came?

A. It was always the practice to send out a copy of the letter and notice, stating purport of the letter, with the allowance of sixty and ten days to appeal from the date of the letter—that is, the date of letter which contained the decision.

Mr. HILL: We offer in evidence the letter of the Secretary of the Interior, Secretary Teller—that is, we offer in evidence this paper, a copy of the letter of the Secretary of the Interior, Secretary Teller, to the Commissioner of the General Land Office and transmitted thence to the office in Olympia, dated June 19, 1883.

Mr. ANDREWS: We object because that is not under the certificate of any officer of the local land office. The testimony of the witnesses is that he thinks it is in the handwriting of a person who was a clerk in the land office. There is no testimony that it was any particular part of his duty to make copies, and there is no testimony that such a copy would be a true copy, and it is not certified by the register and receiver, who are the lawful custodians of these records. There must be on file in the office of the Commis-

sioner of the General Land Office the original letter from the Secretary of the Interior which could have been properly certified, hence this is not the best evidence.

(Argument by counsel.)

Mr. HILL: I will withdraw the offer. I think we have not met counsel's objection.

The COURT: Let the record show that the offer is withdrawn.

109 Mr. S. F. COOMBS, a witness called on behalf of defendant, after being duly sworn, testified as follows:

(Mr. ANDREWS:)

Q. This testimony ought to have been introduced in our original case. Were you county auditor of King county, ever?

A. Yes, sir.

Q. When were you auditor of King county?

A. 1862–'4.

Q. When did you go out of office?

A. At the close of 1864.

Q. At the close of 1864?

A. Yes, sir.

Q. You were a notary public, were you?

A. I was.

Q. At what time were you a notary public?

A. About the same time. I do not remember exactly when.

Q. Let me ask you if in 1864 you had a notarial seal.

A. I did.

Q. Did you have that seal in March, 1864?

A. I am quite certain that I did.

Q. Do you remember taking any acknowledgements of deeds from Mr. Bagley as commissioner of the university or president of the board of commissioners?

Mr. HILL: We object as immaterial.

Mr. ANDREWS: We simply propose to prove that the instruments were not executed and acknowledged in 1864, but in 1865. That is the purpose of the proof.

Mr. HILL: We object. Since the purpose stated is to show that this acknowledgement is not correct—the certificate of the acknowledgement—I object as *as* incompetent as well as immaterial.

The COURT: Objection overruled. Exception allowed.

A. I did. I took acknowledgements for Mr. Bagley during that time.

Q. Now relate to the court the manner in which those acknowledgements were taken.

Mr. HILL: I object.

The COURT: Objection sustained.

Mr. ANDREWS: I think that is right.

Q. Now I will ask you, Mr. Coombs, if you know whether or not

the conveyance from Daniel Bagley to John Ross of the Holgate homestead land was executed in March, 1864, or later.

Mr. HILL: I object to that.

The COURT: Objection overruled. Exception allowed.

A. I think it was later.

110 The COURT: That is not the question; do you know?

A. Yes, sir.

Q. You say you do know? Now, what is the fact about it?

Mr. HILL: I object as incompetent and immaterial.

Mr. ANDREWS: I propose finally to ask the reasons, and your honor then can see the whole force of it.

The COURT: That raises the question that counsel was contending for a moment ago, whether or not the notary can give testimony contradictory to his acknowledgement. That raises the question squarely.

(Argument by counsel.)

Mr. ANDREWS: Suppose that we show that Mr. Coombs never took any acknowledgement of any deed from Bagley to Ross, but that Mr. Bagley brought a number of deeds to him and he affixed to these deeds his official seal, or he took Mr. Bagley's acknowledgement in blank and Mr. Bagley himself, as it became convenient, wrote in those dates.

The COURT: Do you propose to prove that?

Mr. ANDREWS: I think we can prove that. I do not offer to prove it for the purpose of impeaching Mr. Bagley's integrity in any manner, but simply for the purpose of showing the fact as it exists. That is the only aim at this time. I think we can prove that.

(Argument by counsel.)

The COURT: I will sustain the objection.

Mr. ANDREWS: I think that is the rule, but I suppose it is my duty to save an exception.

The COURT: We sustain the objection to his witness testifying to any fact that would impeach his certificate. We do not hold that you cannot impeach it on the ground of fraud. We sustain the objection to the notary public testifying to anything which will impeach his certificate.

Q. Did you say you knew Mr. Holgate?

A. I did.

Q. Did you know him while he lived at Salmon Bay?

A. Well, not exactly the month. I remember pretty near, because I lived down there for awhile and was pretty intimate with Mr. Holgate.

Q. Do you know about the time he moved away from Salmon Bay?

A. Well, it was some time in 1864–'5.

Q. Some time in 1864–'5?

A. Yes, sir.

111 Q. Mr. Coombs, could it have been as early as March, 1864?

Mr. HILL: We object to his leading the witness by such strong suggestions.

The COURT: It is rather leading, but we will permit it.

A. I am pretty certain that it was the latter part of 1864. It was a long time ago. Of course, I was very intimate with the parties, and I know by dates that I was located up about there, and, being county auditor, it comes to my mind now that it was some time in 1864–'5. I should judge, though, in 1864.

Q. What particular piece of land are you speaking of?

A. Down near the mouth of Salmon bay.

Q. Was it Holgate's homestead?

A. Yes, sir.

Q. Do you know that he sold his improvements to John Ross?

A. Well, that I am not certain, just when he sold them; but I know pretty well the time he moved from there up White river.

Q. Let me ask you this question: Did he sell to Ross his improvements about the time he moved from there?

A. About that time.

Q. I will ask you if you know anything about the relinquishment from Holgate.

A. I know nothing about it.

Cross-examination.

(Mr. HILL:)

Q. You cannot remember accurately at this distant date just what time these particular occurences were?

A. It was in 1864, I am pretty certain; somewhere in the latter part of 1864 or the first part of 1865.

Mr. ANDREWS: We offer in evidence a certificate from the register of the land office at Seattle, showing that the homestead application of Mr. Holgate remained uncancelled from the time of filing until 1871.

Mr. HILL: That has been proved five or six times. We object as incompetent and immaterial.

(Argument by counsel.)

The COURT: We will sustain the objection. Exception allowed.

112 Mr. JOHN SCHWEITZER, a witness called on part of defendant, after being duly sworn, testified as follows:

(Mr. ANDREWS:)

Q. Mr. Schweitzer, do you know the land in controversy in this case?

A. Yes, sir.

Q. Were you in the United States land office at a certain time

when this list No. 2 was presented by the commissioner of the university?

A. Yes, sir.

Q. At what time was that?

Mr. HILL: If the court please, of course, when Mr. Coombs was called, counsel said that he should have called him on the main case and we made no objection, but there is a reasonable limit. Of course, their only right is to answer our rebuttal.

The COURT: Is this offered as part of your original case?

Mr. ANDREWS: It will be to the same purport as Mr. White's testimony, except that we intend to prove by this witness that list No. 2 was filed in the United States land office at that time for the first time.

The COURT: Why was not the witness produced before you closed your case?

Mr. ANDREWS: It was simply an oversight.

(Argument by counsel.)

Mr. ANDREWS: We will obviate the objection by withdrawing the witness from the stand.

(At this time further proceedings were adjourned until 2 p. m.)

(Afternoon session.—Continuation of proceedings pursuant to adjournment.)

Mr. ANDREWS: We offer in evidence a certificate of the naturalization of John Keane, the defendant in this case.

Mr. HILL: We object as incompetent. The naturalization of a person is a judicial act. We have here the certificate of the clerk of the court that Keane was naturalized, but we do not have the judgment of the court.

(Argument by counsel.)

The COURT: We will overrule the objection. Exception allowed.

(Paper received and marked Exhibit 7.)

Mr. ANDREWS: That is our case.

(Testimony closed.)

113 In the Superior Court of King County, State of Washington.

ANNA SOPHIA BRYGGER, Executrix, and OLE SCHILLESTAD, Plaintiffs,
vs.
JOHN KEANE, Defendant. } 6576.

I, I. J. Lichtenberg, judge of the superior court of King county, State of Washington, before whom the above-entitled cause was tried, do hereby certify that the foregoing statement of facts contains all the material facts in the said cause, and I further certify that

the said statements of facts was duly settled before me by the attorneys of the respective parties.

In testimony whereof I have hereunto set my hand and seal this 31st day of Jan., 1891.

I. J. LICHTENBERG, *Judge.*

114 In the Superior Court of King County, State of Washington.

ANNA SOPHIA BRYGGER, Executrix, and OLE SCHILLESTAD, Executor, of the Estate of Johan Brygger, Deceased, Plaintiffs,
vs.
JOHN KEANE, Defendant.

STATE OF WASHINGTON, *County of King,* } ss:

I, W. B. Spencer, county clerk and *ex officio* clerk of the superior court of King county, do hereby certify that the foregoing bundle of exhibits is the bundle referred to as Exhibits No. 1 in my certificate of this date to the transcript in cause Brygger *vs.* Keane for supreme court.

In witness whereof I have hereunto set my hand and affixed the seal of said superior court this 12th day of May, 1891.

[Seal of the Superior Court of King County, Washington.]

W. B. SPENCER,
County Clerk.

115 Vol. 1 D., page 113.

C. Brownell to Lemuel J. Holgate. } Deed.

This indenture made the 2d day of November A. D. 1863, between C. C. Lewis, agent and attorney for Catharine C. Brownell of Essex Co. and State of Massachusetts, and Lemuel J. Holgate of the second part;

Witnesseth, that the said party of the 1st part, for and in consideration of the sum of four hundred and eighty dollars, lawfully money of the U. S. of A. to him in hand paid by the said party of the second part, at or before the ensealing and delivery of the- presents, the receipt whereof is hereby acknowledged, has granted, bargained, sold, aliened, remised, released, conveyed and confirmed and by these presents do- grant, bargain, sell, alien, remise, release, convey and confirm unto the said party of the second part, and to his heirs and assigns forever, all that portion of land lying in King county & Terr'y of Washington, township 23, N. R. 3 east known and described as the donation land claim of Henry Meader, on the maps and plats in the land office at Olympia, W. T., containing one hundred and sixty acres.

Together with all and singular the tenements, hereditaments and appurtanances thereunto belonging, or in anywise appertaining, and

the reversion and reversions, remainder and remainders, rents, issues and profits thereof.

And also all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in or to the above-described
116 premises, and every part and parcel thereof, with the appurtenances.

To have and to hold all and singular the above mentioned and described premises, together with the appurtenances unto the said party of the 2d part, his heirs and assigns forever.

And the said C. C. Lewis, his heirs, the said premises in the quiet and peac-able possession of the said party of the 2d part Lemuel J. Holgate, his heirs and assigns, against the said party of the first part, his or her heirs, and against all and every person and persons whomsoever lawfully claiming or to claim the same shall and will warrant and by these presents forever defend.

In witness whereof, the said party of the first part has hereunto set his hand and seal the day and year first above written.

C. C. LEWIS, [L. S.]
Sole Agent and Attorney for Catharine C. Brownell, of Essex Co., State of Massachusetts.

Signed, sealed, and delivered in the presence of—
N. DOANE.
L. T. B. ANDREWS.

TERRITORY OF WASHINGTON, } ss:
County of King, }

On this 2d day of November, A. D. 1863, personally appeared before me C. C. Lewis and acknowledged that he is the individual who executed the foregoing deed as attorney-in-fact for Catharine C. Brownell, sole heir to Henry Meader, late of King Co., deceased, and that he executed the same for the uses and purposes therein mentioned and by virtue of a power of attorney recorded with the records of King Co. aforesaid.

In testimony whereof I have hereunto set my hand and official seal the day and year last herein written.

[NO SEAL.] SAML F. COOMBS,
Notary Public, W. T.

Received for record November 2nd, 1863.
SAML F. COOMBS, *Auditor.*

117 STATE OF WASHINGTON, } ss:
County of King, }

I, W. R. Forrest, auditor of King county, State of Washington, and *ex officio* recorder of deeds in and for said county, do hereby certify the above and foregoing to be a true and correct copy of a deed as recorded in this office in vol. 1 of Deeds, page 113, records of King county.

Auditor's Seal, King County, State of Washington.

Witness my hand and official seal this 19th day of June, 1890.

W. R. FORREST,
Auditor of King County, Washington,
By —— ——, *Deputy.*

(Endorsed on back: Certified copy. C. C. Brownell to J. J. Holgate. Deed. A 6576—2. Pl'tf's Ex. I. A. C. B. Used in hearing & filed June 19, '90. M. M. Holmes, clerk.)

118 Refer in reply to this initial "C."

R. A.
C. A. K.
J. J. B.
F. P.
I. V. W.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *Jan.* 28, 1889.

1888.
13776
12777

{U. S. Land Office, Feb. 8, 1889. Seattle, W. T.}

Register and receiver, Seattle, Washington Ty.

GENTLEMEN: On December 14, 1888, you forwarded to this office the appeal of John Keane from the action of the register on November 5, 1888, reporting for cancellation said Keane's homestead entry No. 10604 for the S. W. ¼ N. W. ¼, sec. 11, tp 25 N., R. 3 E.

This action was taken on the ground that the land in question had been selected for university purposes, and also that the application of one Frank Tollotson for the same tract, rejected by you Sept. 15, 1886, is now pending on appeal before this office. Appellant specifies as errors that the report for cancellation is the action of the register alone and not the joint action of the two local officers; that the territorial selection is void on account of a prior entry of the same tract remaining uncancelled at date of selection, and that Tollotson's attempted entry is fraudulent.

The notice that cancellation has been recommended, a copy of which accompanies the appeal, is signed by the register only. While the concurrence of both officers is necessary to the validity of any judicial act within the jurisdiction of the local office, reporting an entry for cancellation is not such an act. The authority of the register and receiver over an entry is exhausted by its admission to the local records. After that action it comes within the jurisdiction of the General Land Office, and any further expression of opinion by the local land officers is not of judicial nature.

119 Either officer or any other person may advise this office of facts relative to cases pending before it, and no objection can be made by a litigating party to the reception of such information. Therefore, in considering Kean's entry, the facts stated by the register may be taken into account without reference to the concurrence of the receiver or even to the official character of the informant. The records of this office show that Lemuel J. Holgate made homestead entry No. 204 for this tract on June 26, 1863, which

entry was cancelled December 20, 1871, in consequence of a relinquishment executed by Holgate February 16, 1864. On March 10, 1864, the tract was selected in satisfaction of the university grant of July 17, 1854 (10 Stat., 305), and the selection was included in list No. 2, filed at Olympia March 5, 1867.

Appellant claims that the selection was *ab initio* void, as having been made in the presence of Holgate's entry uncanceled on the record. The fact, however, that Holgate's relinquishment was executed before the selection, was held sufficient to validate the entry by Secretary Teller in the case of Fred. Jenson, June 19, 1883, who attacked the selection on the same ground, and the Secretary adds: "The fact that Holgate's relinquishment was not returned to and noted on your records until 1871 shows irregularity on the part of the local officers, but cannot affect the right of the university."

Under later rulings also such a selection, even if made before relinquishment by the prior entryman, would be held not void but voidable; and, though invalid at date of entry on account of conflicting rights, it would be approved if ultimately disembarrassed of such objections. (Durand *vs.* Martus, 120 U. S., 366; State of California, 6 L. D., 571; McKenzie *vs.* California, 6 L. D., 680).

120 I am therefore of opinion that the university selection is valid, which makes it unnecessary to consider the merits of Tillotson's application. Kean's entry is accordingly held for cancellation.

You will so notify the entryman through his attorney, John Arthur, allowing sixty days for appeal from the decision, and make due report.

Very respectfully, S. M. STOCKSLAGER,
Commissioner.

I, Jno. B. Baird, register of the land office at Seattle, W. T., do hereby certify that the above and foregoing is a true and correct copy of the letter of said Commissioner on file in this office.

Seattle, W. T., Feb. 23, 1889.

JNO. B. BAIRD, *Register.*

(Endorsed on back:) A letter of the Commissioner of Jan. 28, 1889. Copy. Keane case. Ex. H. A. C. B. Filed June 19, '90. M. M. Holmes, clerk.

121 Vol. 12, No. 755 M.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, *March* 14, 1890.

The Commissioner of the General Land Office.

SIR: Your office, by letter of October 30, 1889, transmitted the papers in the cases (consolidated) of John Keane and John Arthur on appeal from your office decisions of July 3, 1889, holding for cancellation their homestead entries for certain described tracts in secs. 10 and 11, T. 25 N., R. 3 E., Seattle land district, Washington.

From an inspection of the records it appears that the entries were allowed October 20 and 27, 1888; that a few days afterward (November 10, 1888) the local officers notified the entrymen that said entries had been allowed by inadvertence and would be reported to your office, with a recommendation that they be cancelled; that on December 14, 1888, the entrymen appealed from this action of the local office to your office; that on January 28, 1889, your office held the entries for cancellation; that on May 28, 1889, after the time allowed for appeal or motion for review had passed, the entrymen applied for review, which was denied July 3rd, 1889. Said entries were allowed by inadvertence, in view of the fact that the tracts covered thereby had been selected by Washington Territory March 10, 1864, under the act of Congress of July 10, 1854 (10 Stat., 305), which selections were confirmed by the act of March 14, 1864 (13 Stat., 28). On April 22, 1889, after the expiration of the time within which Keane and Arthur could have appealed from your
122 office decision of January 28, 1889, the list of university selections was finally approved, passing full legal title thereto to the (then) Territory of Washington.

The title to the tracts in question having thus passed to the Territory of Washington, the jurisdiction of this department over them has ceased, and nothing remains for it to do except to dismiss the appeals, which are accordingly hereby dismissed.

The papers transmitted by your office letter (K) of October 30, 1889, are herewith returned.

Very respectfully, JOHN W. NOBLE, *Secretary.*
G. C.

I, T. M. Reed, register of the land office at Seattle, do hereby certify that the above and foregoing is a true and correct copy of the letter of the Secretary of the Interior dismissing the appeals of John Keane and John Arthur, as it appears in the land office at Seattle, Washington.

T. M. REED, *Register.*

(Endorsed on the back: A 6576—2. Pl'tf's Ex. G. A. C. B. Used in hearing & filed June 18, '90. M. M. Holmes, clerk.

123 In the Probate Court of King County, Washington Territory.

In the Matter of the Estate of JOHN BRYGGER, Deceased. No. 776.

Letters Testamentary.

Whereas the last will of John Brygger, deceased, was on the 17th day of December, 1888, duly exhibited, proven, and recorded in our said probate court, a copy of which is hereto annexed;

And whereas it appears in and by the said will that Anna Sophia Brygger and Ole Schillestad is appointed executor thereon:

Now, therefore, know all men by these presents that we do hereby authorize the said Anna Sophia Brygger and Ole Schillestad to execute said will according to law.

Seal of Probate Court of King Co., W. T.

Witness Junius Rochester, judge of our said probate court, and the seal of said court, hereto affixed this 20th day of December, 1888.

C. A. RICE,
Clerk of the Probate Court of King Co., Wash. Terr.

Code, secs. 1382 & 1386.

124 In the Probate Court of King County, Washington.

In the Matter of the Estate of JOHN BRYGGER, Deceased. No. 776.

Certificate to Transcript of Letters Testamentary.

I, Richard Osborn, judge and *ex officio* clerk of the probate court of King county, State of Washington, do hereby certify the foregoing annexed document to be a true, correct, and complete copy of letters testamentary in the above-entitled matter in said probate court, and that I have compared the same with the original document, of which the annexed purports to be a copy, and which original document is now on file in the said probate court and in my exclusive possession, and that I am by law the custodian thereof, and that the said foregoing annexed document is a correct transcript of the said original document and of the whole.

Seal of Probate Court, King County, W. T.

In witness whereof I have hereunto set my hand and affixed the seal of the said probate court this 18 day of June, 1890.

RICHARD OSBORN,
Judge and ex Officio Clerk of the Probate Court of King County, Wash.

(Endorsed on back: A 6576—2. Ex. F. A. C. B. Used in hearing & filed June 18, '90. M. M. Holmes, clerk. No. 776. In the probate court of King county, Wash. In the matter of the estate of John Brygger, Deceased. Certified copy of letters testamentary.)

125 In the Probate Court of King County, Washington Territory.

In the Matter of the Estate of JOHN BRYGGER, Deceased. No. 776.

Oath of Executor.

COUNTY OF KING, *ss:*

Anna Sophia Brygger and Ole Schillestad, being duly sworn, on oath each deposes and says: I am one of the persons who has been appointed executor of the last will and testament of John Brygger, deceased, by the above-entitled court, and I solemnly swear that I will perform according to law the duties of my trust as executor of the last will of John Brygger, deceased, so help me God.

ANNA SOPHIA BRYGGER.
OLE SCHILLESTAD.

Subscribed and sworn to before me this 20th day of December, 1888.

[Seal of Probate Court, King County, Wash. Ter.]

C. A. RICE,
Clerk of the Probate Court of King County, Washington Territory.

Code, sec. 1393.

126 In the Probate Court of King County, Washington Territory.

In the Matter of the Estate of JOHN BRYGGER. No. 776.

Certificate to Transcript of Oath of Executors.

—, Richard Osborn, judge and *ex officio* clerk of the probate court of the said county and Territory, do hereby certify that the foregoing and annexed document purporting to be a copy of the oath of executors has been by me carefully compared with original oath of executors of which it purports to be a copy, which original oath is now on file in my office and by law in my exclusive custody, and I further hereby certify that the said annexed and foregoing document is a full, true, and correct copy of the said original oath of executors in the estate of John Brygger.

In testimony whereof I have hereunto set my hand and affixed the seal of our said probate court this 18th day of May, 1889.

Seal of Probate Court, King County, Wash. Ter.

RICHARD OSBORN,
Judge and ex Officio Clerk of the Probate Court of King County, Wash. Ter.

(Endorsed on back: No. 776. In the probate court of King county, Wash. Terr. In the matter of the estate of John Brygger. Certified copy of oath of executors. A 6576—2. Ex. E. A. C. Used in hearing & filed June 18, '90. M. M. Holmes, clerk.)

127 In the name of the benevolent Father of all:

I, John Brygger of the county of King in the Territory of Washington do make and publish this my last will and testament hereby revoking all wills by me at any time heretofore made.

I hereby declare that my children Johanna Hansine wife of Carl Ask, Jacobine Albertine, wife of O. H. Smith, and Johanna Georgina wife of Jacob R. Olsen all of said children being issue of my marriage with my former wife Johanna Georgina who died in the Kingdom of Norway, have had and received from me from time to time the following sums paid and advanced to them, to wit:

Johanna Hansine has received the sum of two thousand three hundred and ninety-four dollars ($2,394.00) of which sum said received by her I hold her note for the sum of eleven hundred and forty ($1,140.00) dollars of date April 15, 1875, signed by Johanna Olsen.

Jacobina Albertine has received the sum of one thousand nine hundred and seventy-six $\frac{60}{100}$ dollars for a part of which to wit: the sum of nine hundred and ninety-five dollars I hold the note of her husband O. H. Smith of date June 11, 1877.

Johanna Georgina has received the sum of two thousand two hundred and twenty-five dollars of which sum I hold her receipt for one thousand seven hundred and twenty-five dollars and the note of herself and husband for the sum of five hundred dollars.

Item first: It is my will and direction that whatever sums of principal and interest may be due from my said above-named daughters or their husbands for and on account of the said sums so advanced and paid them whether by note or receipt or on account at the time of my death that said sums so due be cancelled,
128 satisfied and discharged and that no part thereof shall be at any time paid.

And I further declare that the said several sums so by me paid and advanced by me to my said daughters are greater than the sums which might be due to them and each of them from the estate of their mother.

Item second: I give and bequeath to my said above-named daughters in addition to said sums so advanced and paid to them the sums following to be paid therein one year after my death to wit:

To: Johanna Hansine wife of Carl Ask, the sum of one dollar.

To Jacobina Albertine wife of O. H. Smith the sum of one dollar.

To Johanna Georgina the sum of fifteen hundred dollars ($1,500.00).

Item third: It is my will and direction that within one year after the land known as the Scheitzer land shall be declared university land, my now wife Anna Sophia who is here vested by me with full power and authority so to do, shall execute and deliver to the "Orphans' Home" of Seattle, a deed for one acre thereof in the northeast corner of the southwest quarter of the northwest quarter of section eleven in township 25 north of range 3 east. Said land to wit: one acre to be so conveyed for the use and benefit of said "orphans' home."

Item fourth: I give and devise to the children of my daughter Johanna who may be living at the time of my death four acres of land next adjoining the said one acre to be conveyed to said "orphans' home" said children to have and hold the fee-simple in remainder subject to a life estate of my said daughter Johanna
129 Hansine, she to have the rents and profits of the said four acres during her life and I direct that my said wife Anna Sophia who is hereby fully empowered so to do shall execute and deliver a deed for said four acres in accordance with the above directions and that the probate court of King county appoint a guardian for said children.

Item fifth: I give and bequeath unto each of my children issue of my marriage with my now wife, Anna Sophia to wit:

Irine, Anna, Jenny, Bertha, Johon Peder and Albert. Each the sum of one dollar.

Item sixth: Having full confidence in my now beloved wife Anna Sophia that she will care for my said children the issue of our marriage named in item fifth, above I give, devise and bequeath unto her my said wife Anna Sophia all of the residue of my estate both real and personal not heretofore devised which I may die seized to have and hold and, dispose of so long as she shall remain my widow hereby giving her full power to grant sell and convey the same in fee as fully as I might now do.

If however she shall again marry it is my will and I so direct that one-half of my separate estate real and personal herein devised to her and all of my interest in the community property real and personal which with the proceeds of any part sold by her shall at the date of such marriage, vest in my said children, Irine, Anna, Jenny, Bertha, Johon, Peder and Albert each an equal share and that from thence my said children shall have own and hold the same in fee as tenants in common, she one undivided half and said children an undivided one-half.

Item seventh: In case my wife shall not again marry then
130 and in such case all the estate herein devised to her remaining shall go to such of my children or their issue as she may by will appoint and direct.

Item eighth: I hereby nominate and appoint my beloved wife Anna Sophia my executrix and Ole Schillestad executor of this my last will and in case such Schillestad shall not survive me then I nominate and appoint in his stead Henry Peterson and I direct that no bond be given or required by my said executor and executrix. And in the event that for any cause it shall become necessary for any court to appoint any executor or executrix by reason of the death of those herein named, then it is my will that no relative of myself or wife shall be appointed.

Item ninth: I further will and direct that my estate be settled without the intervention of the probate court except so far as to prove this will and cause an inventory of my estate to be filed.

That no letters testamentary or of administration shall be issued.

That proof of all my debts be made to the satisfaction of my executors and the same to be paid by them and my said executrix and executors are enjoined to collect and receive all monies due me at the time of my death and to pay all legacies, bequest and charges and to at the end of one year on the settlement of my estate pay over to my said wife Anna Sophia any and all funds balance after debts paid and in the execution of the trusts herein reposed my said wife alone as executrix and devisee shall have power to grant bargain sell and convey real estate as herein aforesaid.

131 In witness whereof I have hereunto set my hand and seal this 20th day of October, 1888.

JOHN BRYGGER. [s. s.]

The above will, pages 1 to 10, inclusive, signed by the testator, Johan Brygger, in our presence and by him published as his last

will in our presence and b- us subscribed as witnesses at his request and in the presence of each other this 20th day of October, 1888.

J. R. LEWIS.
C. O. ASPAAS.

132 In the Probate Court of King County, Washington Territory.

In the Matter of the Estate of JOHAN BRYGGER, Deceased. No. 776.

Decree Admitting Will to Probate.

O. Schillestad having, on the 26th day of November, 1888, submitted to and filed in this court a certain document in writing of a testamentary nature, purporting to be the last will and testament of John Brygger, deceased, and also his petition praying, among other things, for the admission to probate of said document as and for the last will and testament of said deceased;

And this court, by order *having* duly made on the 26th day of November, 1888, — appointed the 27th day of November, 1888, at 10 o'clock a. m., for the proving of said will and hearing of said petition:

Now, on the 27th day of November, 1888, the hearing of the said petition comes on regularly before the court, and—

The testimony of C. O. Aspaas being taken and filed, and it appearing to the court that J. R. Lewis, the other attesting witness to said will, is absent, it is ordered that the commission issue to take his testimony; and now, *in* this 17th day of December, 1888, said testimony having been returned and filed—

And it fully appearing to the satisfaction of the court that said petition sets forth all the facts necessary to give this court jurisdiction over the estate of said deceased, and witnesses having been examined under oath and their testimony taken and reduced to writing, to wit, the testimony of C. O. Aspaas and J. R. Lewis, subscribing witnesses to the said last will, and the same having been filed, and the evidence being closed, and the matter having
133 been duly and regularly and finally submitted to the court for consideration and decision, and all and singular the law and the premises being now by the court here fully understood and duly considered, the court finds the facts applicable to the matter to be as follows: That said John Brygger died testate on the 20th day of November, 1888, in King county, Washington Territory, and at the time of his death the said deceased was a resident of King county, Washington Territory, and left estate in said King county subject to administration in Washington Territory.

That the said document purporting to be the last will of John Brygger, deceased, was duly executed by him in his lifetime, to wit, on the 20th day of October, 1888, at his residence, in King county, Washington Territory, in the presence of at least two competent witnesses, to wit, C. O. Aspaas and J. R. Lewis, the subscribing wit-

nesses thereto, and also that the said deceased then and there, in the presence of said witnesses, published the said document as and declared the same to the said witnesses to be his last will and testament, and the said witnesses then and there attested the same at his request and in his presence and in the presence of each other.

That the said deceased at the time of executing said last will and testament was over the age of majority, to wit, of about the age of sixty-four years, and was of sound and disposing mind and memory and not acting under duress, menace, fraud, or any undue influence whatsoever, nor was he in any respect incompetent by last will to devise and bequeath his estate.

That Anna Brygger and O. Schillestad are named in the said will as executors thereof without bonds; that the said Anna Sophia Brygger and Ole Schillestad are both residents of Washing-
134 ton Territory, above the age of 21 years, and suetable and competent persons to act as executors of last will and testament of said deceased.

Now, therefore, by reason of the law and the facts aforesaid, it is considered, ordered, adjudged, and decreed by the court here that the jurisdiction to admit to probate the last will and testament of the said deceased appertains unto our said probate court; that the said document submitted for probate on the 26th day of November, 1888, is the last will and testament of the said John Brygger, deceased, and that the same was properly and legally executed and is entitled to be, and is hereby, admitted to probate.

That a certificate of probate thereof be granted, and that the said last will and testament, together with said certificate, be duly entered of record in the record of wills in this court as provided by law, and that the said Anna Sophia Brygger and O. Schillestad be, and they are hereby, appointed executors of said will, and that they take and file in this court an oath, in due form, to the effect that they will faithfully perform the duties of their trust as such executors.

Done at chambers this 17th day of December, 1888.

JUNIUS ROCHESTER,
Judge of the Probate Court of King County, W. T.

135 In the Probate Court of King County, Washington Territory.

In the Matter of the Estate of JOHN BRYGGER. No. 776.

Certificate to Transcript of Will and Decree Admitting Will to Probate.

I, Richard Osborn, judge and *ex officio* clerk of the probate court of the said county and Territory, do hereby certify that the foregoing and annexed document, purporting to be true copies of the will and decree admitting will to probate in the estate of John Brygger, has been by me carefully compared with the original will and decree of which they purport to be copies, which originals are now on file in my office and by law in my exclusive custody; and

I further hereby certify that the said annexed and foregoing documents are full, true, and correct copies of the said original will of John Brygger and decree admitting will to probate.

Seal of Probate Court, King County, W. T.

In testimony whereof I have hereunto set my hand and affixed the seal of our said probate court this 17th day of May, 1889.

RICHARD OSBORN,
Judge and ex Officio Clerk of the Probate Court of King County, W. T.

(Endorsed on back: No. 776. In the probate court of King Co., Wash. Terr. In the matter of the estate of Johan Brygger. Certified copy of will and decree. A 6576. Ex. D. A. C. B. Used in hearing & filed June 18, '90. M. M. Holmes, clerk.)

136 John Ross & wife to John Brygger. } Warranty Deed.

This indenture made this fourth day of April A. D. 1876 between John Ross and Mary Jane Ross his wife of the county of King and Territory of Washington the parties of the first part and John Brygger of the same place the party of the second part witnesseth that the parties of the first part for and in consideration of the sum of nine hundred and ninety-four $\frac{25}{100}$ (894.25) dollars gold coin of the United States to him in hand paid by the said party of the second part the receipt whereof is hereby acknowledged do by these presents grant bargain sell convey and confirm unto the said party of the second part and to his heirs and assigns the following-described tracts lots and parcels of land situate in the county of King and Territory of Washington and particularly bounded and described as follows to wit: All of lot three in section ten and lot four in section eleven township twenty-five north range three east containing thirty-eight and $\frac{85}{100}$ acres of land also lots one and two of section ten and the southwest quarter of the northwest quarter of section eleven all in township twenty-five north range three east containing one hundred and sixty acres of land more or less together with the appurtenances to have and to hold the said premises with the appurtenances unto the said party of the second part and to his heirs and assigns forever and the said parties of the first part their heirs executors and administrators do by these presents covenant grant and agree to and with the said party of the second part his heirs and assigns that they the said party of the first part their heirs executors and administrators all and singular the
137 premises hereinbefore conveyed described and granted or mentioned with the appurtenances unto the said party of the second part his heirs and assigns and against all and every person and persons whomsoever lawfully claiming or to claim the same or

any part thereof shall and will warrant and forever defend Witness our hands and seals the day and year first above written.

JOHN ROSS. [SEAL.]
MARY JANE ROSS. [SEAL.]

Signed, sealed, and delivered in the presence of—
J. W. ALVERSON.
C. H. HANFORD.

TERRITORY OF WASHINGTON, } ss.
County of King, }

On this fourth day of April, A. D. 1876, before me, C. H. Hanford, a notary public in and for said Territory, personally came John Ross and Mary Jane Ross, his wife, to me known to be the individual described in and who executed the within instrument, and acknowledged that they signed and sealed the same as their free and voluntary act and deed for the uses and purposes therein mentioned; and the said Mary Jane Ross, wife of said John Ross, upon an examination by me separate and apart from her said husband, when the contents of said instrument were by me fully made known unto her, acknowledged that she did voluntarily of her own free will and without the fear of or coercion from her husband execute the same.

Witness my hand and official seal the day and year in this certificate first above written.

[SEAL.] C. H. HANFORD,
Notary Public in and for Washington Territory.

Filed for record April 22nd, 1876, at 10 a. m.
M. S. BOOTH, *Auditor.*

138 COUNTY OF KING } ss.
Territory of Washington, }

I, W. R. Forrest, auditor of King county, Washington Territory, and *ex officio* recorder of deeds in and for said county, do hereby certify the above and foregoing to be a true and correct copy of a deed from John Ross and wife to John Brygger as recorded in this office, in vol. 11 of deeds, page 583, records of King county.

Auditor's Seal, King County, Washington Territory.

Witness my hand and official seal this 16th day of May, 1889.
W. R. FORREST,
Auditor, King County, W. T.,
By H. L. VAN BROCKLIN, *Deputy.*

(Endorsed on back: Deed. John Ross and wf. to John Brygger. A 6576—2. Ex. C. A. C. B. Filed June 18, '90. Used in hearing. M. M. Holmes, clerk.)

139 Whereas, by act of Congress approved 17th of July, 1854, two townships of land of thirty-six sections each, to be se-

lected in legal subdivisions under the direction of the legislature shall be reserved for university purposes, and whereas by act of the legislature of Washington Territory passed January 11th, 1861, Daniel Bagley John Webster and Edmund Carr, all of King county, W. T., were constituted and appointed a board of commissioners, authorized to make selection of lands reserved by Congress for university purposes, to make entry of such selections in the land office and to sell the same for any sum not less than one dollar and fifty cents per acre. And whereas at a meeting of the said commissioners held at Seattle, King county, Washington Territory, on the 22d of February 1861, the above-named Daniel Bagley was duly appointed president of said board with power to act for and in behalf of said board under the provisions of the law creating their appointment, and whereas the undermentioned tracts of lands have been duly and properly entered in the land office as a portion of the said public lands reserved for university purposes.

Now therefore, this indenture, made the 10th day of March in the year of our Lord one thousand eight hundred and sixty-four between the above-mentioned Daniel Bagley president of the board of commissioners and acting — aforesaid, of the first part, and John Ross, of King county, Washington Territory, of the second part; witnesseth that the said party of the first part for and in consideration of the sum of two hundred and forty (240) dollars lawful money of the United States to him in hand paid at or before the ensealing and delivery of these presents the receipt whereof is hereby acknowledged hath granted, bargained, sold and conveyed and by these presents doth grant, bargain sell and convey, unto the
140 said party of the second part and to his heirs and assigns forever all the right title and interest vested in said board of commissioners by the laws of Congress and of this Territory of in and to lots one and two of section ten and southwest quarter of northwest quarter of section eleven all in township twenty-five, north range three east containing one hundred and sixty acres of land more or less.

To have and to hold all and singular the above mentioned and described premises unto the said party of the second part his heirs and assigns forever.

In witness whereof the said party of the first part hath hereunto signed his name and affixed his seal the day of date above written.

DANIEL BAGLEY,
President of the Board of Commissioners.

[D. B., L. S., 1864.]

W. E. BARNARD.

Signed, sealed, and delivered in presence of—
SAML F. COOMBS.

TERRITORY OF WASHINGTON, 3D JUDICIAL DISTRICT, } ss:
County of King, }

On this 10th day of March, A. D. 1864, came Daniel Bagley, to me personally well known, and acknowledged that he executed the same for the uses and purposes therein mentioned.

Witness my hand and seal the day and date last above written.

[SEAL.] SAML F. COOMBS,
Notary Public, W. T.

Recorded Feb'y 4th, 1864.

GARDNER KELLOGG,
Auditor King County, W. T.

141 TERRITORY OF WASHINGTON, } ss:
County of King, }

I, W. R. Forrest, auditor of King county, Washington Territory, and *ex officio* recorder of deeds in and for said county, do hereby certify the above and foregoing to be a true and correct copy of a deed from Daniel Bagley, commissioner, to John Ross, as recorded in this office in vol. one of Deeds, page 239, records of King county.

Auditor's Seal, King Co., Washington Territory.

Witness my hand and official — this 8th day of March, 1889.

W. R. FORREST,
Auditor King County, W. T.,
By H. L. VAN BROCKLIN, *Deputy.*

(Endorsed on back: A 6576—2. Ex. B. A. C. B. Used in hearing & filed June 18, '90. M. M. Holmes clerk. Deed, Daniel Bagley, commissioner, to John Ross, at request of H. J. Jacobs.)

List No. 14, Exhibiting the Tracts of Public Land Situated in the District of Lands Subject to Sale at Seattle, Washington Territory, which Have Been Selected for the said Territory under the Provisions of the 4th Section of the Act of Congress, Approved July 17, 1854, Entitled "An Act to Amend the Act Approved Sept. 27th, 1850, to Create the Office of Surveyor General of the Public Lands in Oregon," and the Act Amendatory Thereof Approved March 14, 1864, Entitled "An Act in Relation to University Lands in Washington Territory."

Date of selection.	No. of list.	Description of tracts.	Sec.	Tp.	Range.	Area of tracts.	Area for which accepted by State.	Remarks.
March 10, 1864..	2	Lot 1	10	25 N.	3 E.	59 09	59 09	
		S. W. ¼ of N. W. ¼ ..	11	25 N.	3 E.	40 00	40 00	
						99 09	99 09	

GENERAL LAND OFFICE, *April* 19, 1889.

The tracts described in the foregoing list have been carefully examined and are found to be free from conflicts and to inure to the Territory for the purposes indicated.

C. A. KEIGWIN,
J. J. BARNES.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, *April* 20, 1889.

It is hereby certified that the tracts described in the foregoing list are embraced in the original list on file in this office of lands selected in the Olympia, now Seattle, land district, Washington Territory, by a duly authorized agent of said Territory, under the provisions of the above-cited acts of Congress, approved July 17, 1854, and March 14, 1864.

It is further certified that the said tracts have been examined and compared with the township plat and tract book of this office and are found to be subject to selection and free from conflicts; and satisfactory proof having been furnished this office of the *bona fide* sale of the land by the territorial authorities, and the selections being in every respect regular, proper, and in accordance with the provisions of the above-named act of Congress of March 14, 1864, it is therefore recommended that the list, embracing 99 acres, be approved as a grant in fee-simple of the land therein described to the said Territory of Washington, said approval being subject to any valid interfering rights which may have existed at the date of selection.

S. M. STOCKSLAGER,
Commissioner.

J. McM.

A. N.

DEPARTMENT OF THE INTERIOR, *April* 22, 1889.

The foregoing list of university selections, embracing 99 acres, is hereby approved as a grant in fee-simple of the land therein described to the Territory of Washington, said approval being subject to any valid interfering rights which may have existed at the date of selection.

JOHN W. NOBLE, *Secretary.*
G. C.

143 DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *May* 9, 1889.

I, S. M. Stockslager, Commissioner of the General Land Office, do hereby certify that the annexed copy of approved list No. 14 of Washington Territory university selections is a true and literal exemplification of the original on file in this office.

In testimony whereof I have hereunto subscribed my [SEAL.] name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

S. M. STOCKSLAGER,
Commissioner of General Land Office.

144 [Endorsed:] 37089. Filed for record at the request of Jacobs & Jenner Aug. 27, A. D. 1889, at 15 min. past 12 m., and recorded in vol. one of Patents, page 373, records of King county, N. Y. W. R. Forrest, Co. auditor, by —— ——, deputy. A 6576². Ex. A. A. C. B. Used in hearing & filed June 18, '90. M. M. Holmes, clerk.

145 [Endorsed:] 217. = 6576. Ex. A, B, C, D, E, F, G, H, I. Filed June 19, 1890. M. M. Holmes, clerk. Bundle exhibits number one. Filed May 22, 1891. C. L. Reichart, clerk.

146 *Rules of Practice in Cases before the United States District Land Offices, the General Land Office, and the Department of the Interior.*

Approved August 13, 1885; to take effect September 1, 1885.

(Reprint.)

Washington:
Government Printing Office.
1889.

147 *Rules of Practice in Cases before the United States District Land Offices, the General Land Office, and the Department of the Interior.*

Approved August 13, 1885; to take effect September 1, 1885.

(Reprint.)

Washington:
Government Printing Office.
1889.

148 RULES OF PRACTICE, REVISED.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *June* 24, 1885.

SIR: I have the honor to submit herewith, for your consideration and approval, a revised draft of the rules of practice in cases before

the district land offices, the General Land Office, and Department of the Interior, embracing such modifications and additions as deemed by me subservient of the good of the practice and public service.

Very respectfully, WM. A. J. SPARKS,
Commissioner.

Hon. L. Q. C. Lamar, Secretary of the Interior.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, *August* 13, 1885.

SIR: I have considered the revised draft of rules of practice in land cases submitted by your letter of June 24, 1885, and have, with slight modifications, adopted the same for promulgation, to take effect 1st proximo. The final official draft is herewith inclosed for the files of your office.

Very respectfully, L. Q. C. LAMAR, *Secretary.*

The Commissioner of the General Land Office.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *August* 13, 1885.

The following rules of practice for the government of proceedings in this Department and subordinate offices in land cases are hereby prescribed, to take effect September 1, 1885. Proceedings under former rules of practice will not be prejudiced by anything herein contained.

L. Q. C. LAMAR, *Secretary.*

149 RULES OF PRACTICE.

I.

Proceedings Before Registers and Receivers.

1.—Initiation of contests.

Rule 1.—Contest may be initiated by an adverse party or other person against a party to any entry, filing, or other claim under laws of Congress relating to the public lands, for any sufficient cause affecting the legality or validity of the claim.

Rule 2.—In every case of application for a hearing an affidavit must be filed by the contestant with the register and receiver, fully setting forth the facts which constitute the grounds of contest.

Rule 3.—Where an entry has been allowed and remains of record the affidavit of the contestant must be accompanied by the affidavits of one or more witnesses in support of the allegations made.

2.—Hearings in contested cases.

Rule 4.—Registers and receivers may order hearings in all cases wherein entry has not been perfected and no certificate has been issued as a basis for patent.

Rule 5.—In case of an entry or location on which final certificate

has been issued the hearing will be ordered only by direction of the Commissioner of the General Land Office.

Rule 6.—Applications for hearings under rule 5 must be transmitted by the register and receiver, with special report and recommendation, to the Commissioner for his determination and instructions.

3.—Notice of contest.

Rule 7.—At least thirty days' notice shall be given of all hearings before the register and receiver unless by written consent an earlier day shall be agreed upon.

Rule 8.—The notice of contest and hearing must conform to the following requirements:

1. It must be written or printed.
2. It must be signed by the register and receiver, or by one of them.

150 3. It must state the time and place of hearing.

4. It must describe the land involved.

5. It must state the register and receiver's number of the entry and the land office where, and the date when, made, and the name of the party making the same.

6. It must give the name of the contestant, and briefly state the grounds and purpose of the contest.

7. It may contain any other information pertinent to the contest.

4.—Service of notice.

Rule 9.—Personal service shall be made in all cases when possible if the party to be served is resident in the State or Territory in which the land is situated, and shall consist in the delivery of a copy of the notice to each person to be served.

Rule 10.—Personal service may be executed by any officer or person.

Rule 11.—Notice may be given by publication alone only when it is shown by affidavit of the contestant, and by such other evidence as the register and receiver may require, that due diligence has been used and that personal service cannot be made. The party will be required to state what effort has been made to get personal service.

Rule 12.—When it is found that the prescribed service cannot be had, either personal- or by publication, in time for the hearing provided for in the notice, the notice may be returned prior to the time fixed for the hearing, and a new notice issued fixing another time of hearing, for the proper service thereof, an affidavit being filed by the contestant showing due diligence and inability to serve the notice in time.

5.—Notice by publication.

Rule 13.—Notice by publication shall be made by advertising the notice at least once a week for four successive weeks in some newspaper published in the county wherein the land in contest lies; and if no newspaper be published in such county, then in the

newspaper published in the county nearest to such land. The first insertion shall be at least thirty days prior to the day fixed for the hearing.

Rule 14.—Where notice is given by publication, a copy of the notice shall be mailed by registered letter to the last known address of each person to be notified thirty days before date of hearing, and a like copy shall be posted in the register's office during the period of publication, and also in a conspicuous place on the land, for at least two weeks prior to the day set for hearing.

6.—Proof of service of notice.

Rule 15.—Proof of personal service shall be the written acknowledgment of the person served or the affidavit of the person who served the notice attached thereto, stating the time, place, and manner of service.

151 Rule 16.—When service is by publication, the proof of service shall be a copy of the advertisement, with the affidavit of the publisher or foreman attached thereto, showing that the same was successively inserted the requisite number of times, and the date thereof.

7.—Notice of interlocutory proceedings.

Rule 17.—Notice of interlocutory motions, proceedings, orders, and decisions shall be in writing, and may be served personally or by registered letter through the mail to the last known address of the party.

Rule 18.—Proof of service by mail shall be the affidavit of the person who mailed the notice, attached to the post-office receipt for the registered letter.

8.—Rehearings.

Rule 19.—Orders for rehearing must be brought to the notice of the parties in the same manner as in case of original proceedings.

9.—Continuances.

Rule 20.—A postponement of a hearing to a day to be fixed by the register and receiver may be allowed on the day of trial on account of the absence of material witnesses, when the party asking for the continuance makes an affidavit before the register and receiver showing—

1. That one or more of the witnesses in his behalf is absent without his procurement or consent;
2. The name and residence of each witness;
3. The facts to which they would testify if present;
4. The materiality of the evidence;
5. The exercise of proper diligence to procure the attendance of the absent witnesses; and
6. That affiant believes said witnesses can be had at the time to which it is sought to have the trial postponed

7. Where hearings are ordered by the Commissioner of the General Land Office in cases to which the United States is a party, continuances will be granted in accordance with the usual practice in United States cases in the courts, without requiring an affidavit on the part of the Government.

Rule 21.—One continuance only shall be allowed to either party on account of absent witnesses, unless the party applying for a further continuance shall at the same time apply for an order to take the depositions of the alleged absent witnesses.

Rule 22.—No continuance shall be granted when the opposite party shall admit that the witnesses would, if present, testify to the statement set out in the application for continuance.

152 10.—Depositions on interrogatories.

Rule 23.—Testimony may be taken by deposition in the following cases:

1. Where the witness is unable, from age, infirmity, or sickness, or shall refuse, to attend the hearing at the local land office.

2. Where the witness resides more than fifty miles from the place of trial, computing distance by the usually traveled route.

3. Where the witness resides out of or is about to leave the State or Territory, or is absent therefrom.

4. Where from any cause it is apprehended that the witness may be unable or will refuse to attend, in which case the deposition will be used only in event that the personal attendance of the witness cannot be obtained.

Rule 24.—The party desiring to take a deposition under rule 23 must comply with the following regulations:

1. He must make affidavit before the register or receiver, setting forth one or more of the above-named causes for taking such deposition, and that the witness is material.

2. He must file with the register and receiver the interrogatories to be propounded to the witness.

3. He must state the name and residence of the witness.

4. He must serve a copy of the interrogatories on the opposing party or his attorney.

Rule 25.—The opposing party will be allowed ten days in which to file cross-interrogatories.

Rule 26.—After the expiration of the ten days allowed for filing cross-interrogatories a commission to take the deposition shall be issued by the register and receiver, which commission shall be accompanied by a copy of all the interrogatories filed.

Rule 27.—The register and receiver may designate any officer authorized to administer oaths within the county or district where the witness resides to take such deposition.

Rule 28.—It is the duty of the officer before whom the deposition is taken to cause the interrogatories appended to the commission to be written out and the answers thereto to be inserted immediately underneath the respective questions, and the whole, when completed, is to be read over to the witness, and must be by him sub-

scribed and sworn to in the usual manner before the witness is discharged.

Rule 29.—The officer must attach his certificate to the deposition, stating that the same was subscribed and sworn to by the deponent at the time and place therein mentioned.

Rule 30.—The deposition and certificate, together with the commission and interrogatories, must then be sealed up, the title of the cause indorsed on the envelope, and the whole returned by mail or express to the register and receiver.

153 Rule 31.—Upon receipt of the package at the local land office, the date when the same is opened must be indorsed on the envelope and body of the deposition by the local land officers.

Rule 32.—If the officer designated to take the deposition has no official seal, a proper certificate of his official character, under seal, must accompany his return.

Rule 33.—The parties in any case may stipulate in writing to take depositions before any qualified officer, and in any manner.

Rule 34.—All stipulations by parties or counsel must be in writing, and be filed with the register and receiver.

11.—Oral testimony before other officers than registers and receivers.

Rule 35.—In the discretion of registers and receivers testimony may be taken near the land in controversy before a United States commissioner or other officer authorized to administer oaths, at a time and place to be fixed by them and stated in the notice of hearing.

2. Officers taking testimony under the foregoing rule will be governed by the rules applicable to trials before registers and receivers. (See rules 36 to 42, inclusive.)

3. Testimony so taken must be certified to, sealed up, and transmitted by mail or express to the register and receiver, and the receipt thereof at the local office noted on the papers, in the same manner as provided in case of depositions by rules 29 to 32, inclusive.

4. On the day set for hearing at the local office the register and receiver will examine the testimony taken by the officer designated, and render a decision thereon in the same manner as if the testimony had been taken before themselves. (See rules 50 to 53, inclusive.)

5. No charge for examining testimony in such cases will be made by the register and receiver.

6. Officers designated to take testimony under this rule will be allowed to charge such fees as are properly authorized by the tariff of fees existing in the local courts of their respective districts, to be taxed in the same or equivalent manner as costs are taxed by registers and receivers under rules 54 to 58, inclusive.

7. When an officer designated to take testimony under this rule, or when an officer designated to take depositions under rule 27, cannot act on the day fixed for taking the testimony or deposition,

the testimony or deposition, as the case may be, will be deemed properly taken before any other qualified officer, at the same place and time, who may be authorized by the officer originally designated, or by agreement of parties, to act in the place of the officer first named.

12.—Trials.

Rule 36.—Upon the trial of a cause the register and receiver may in any case, and should in all cases when necessary, personally direct the examination of the witnesses, in order to draw from
154 them all the facts within their knowledge requisite to a correct conclusion by the officers upon any point connected with the case.

Rule 37.—The register and receiver will be careful to reach, if possible, the exact condition and status of the land involved by any contest, and will ascertain all the facts having any bearing upon the rights of parties in interest.

Rule 38.—In pre-emption cases they will particularly ascertain the nature, extent, and value of alleged improvements; by whom made, and when; the true date of the settlement of persons claiming; the steps taken to mark and secure the claim, and the exact status of the land at that date as shown upon the records of their office.

Rule 39.—In like manner, under the homestead and other laws, the conditions affecting the inception of the alleged right, as well as the subsequent acts of the respective claimants, must be fully and specifically examined.

Rule 40.—Due opportunity will be allowed opposing claimants to confront and cross-examine the witnesses introduced by either party.

Rule 41.—No testimony will be excluded from the record by the register and receiver on the ground of any objection thereto; but when objection is made to testimony offered, the exceptions will be noted, and the testimony, with the exceptions, will come up with the case for the consideration of the Commissioner. Officers taking testimony will, however, summarily put a stop to obviously irrelevant questioning.

Rule 42.—Upon the day originally set for hearing, and upon any day to which the trial may be continued, the testimony of all the witnesses present shall be taken and reduced to writing. When testimony is taken in short-hand, the stenographer's notes must be written out, and the written testimony then and there subscribed by the witness and attested by the officer before whom the same is taken.

13.—Appeals.

Rule 43.—Appeals from the final action or decisions of registers and receivers lie in every case to the Commissioner of the General Land Office. (Revised Statutes, sections 453, 2478.)

Rule 44.—After hearing in a contested case has been had and closed, the register and receiver will, in writing, notify the parties in interest of the conclusions to which they have arrived, and that

thirty days are allowed for an appeal from their decision to the Commissioner, the notice to be served personally or by registered letter through the mail to their last known address.

Rule 45.—The appeal must be in writing or in print, and should set forth in brief and clear terms the specific points of exception to the ruling appealed from.

Rule 46.—Notice of appeal and copy of specification of errors shall be served on appellee within the time allowed for appeal, and appellee shall be allowed ten days for reply before transmittal of the record to the General Land Office.

155 Rule 47.—No appeal from the action or decisions of the register and receiver will be received at the General Land Office unless forwarded through the local officers.

Rule 48.—In case of a failure to appeal from the decision of the local officers, their decision will be considered final as to the facts in the case and will be disturbed by the Commissioner only as follows:

1. Where fraud or gross irregularity is suggested on the face of the papers.
2. Where the decision is contrary to existing laws or regulations.
3. In event of disagreeing decisions by the local officers.
4. Where it is not shown that the party against whom the decision was rendered was duly notified of the decision and of his right of appeal.

Rule 49.—In any of the foregoing cases the Commissioner will reverse or modify the decision of the local officers or remand the case, at his discretion.

Rule 50.—All documents once received by the local officers must be kept on file with the cases, and the date of filing must be noted thereon; and no papers will be allowed under any circumstances to be removed from the files or taken from the custody of the register and receiver, but access to the same, under proper rules, so as not to interfere with necessary public business, will be permitted to the parties in interest, or their attorneys, under the supervision of those officers.

14.—Reports and opinions.

Rule 51.—Upon the termination of a contest the register and receiver will render a joint report and opinion in the case, making full and specific reference to the postings and annotations upon their records.

Rule 52.—The register and receiver will promptly forward their report, together with the testimony and all the papers in the case, to the Commissioner of the General Land Office, with a brief letter of transmittal, describing the case by its title, the nature of the contest, and the tract involved.

Rule 53.—The local officers will thereafter take no further action affecting the disposal of the land in contest until instructed by the Commissioner.

15.—Taxation of costs.

Rule 54.—Parties contesting pre-emption, homestead, or timber-culture entries and claiming preference rights of entry under the second section of the act of May 14, 1880 (21 Stat., 140), must pay the costs of contest.

Rule 55.—In other contested cases each party must pay the costs of taking testimony upon his own direct and cross examination.

Rule 56.—The accumulation of excessive costs under rule 54 will not be permitted; but where the officer taking testimony shall rule that a course of examination is irrelevant, and checks the same under rule 41, he may, nevertheless, in his discretion, allow the same to proceed at the sole cost of the party making such examination.

156

Rule 57.—Where parties contesting pre-emption, homestead, or timber-culture entries establish their right of entry under the pre-emption or homestead laws of the land in contest by virtue of actual settlement and improvement, without reference to the act of May 14, 1880, the cost of contest will be adjudged under rule 55.

Rule 58.—Registers and receivers will apportion the costs of contest in accordance with the foregoing rules, and may require the party liable thereto to give security in advance of trial, by deposit or otherwise, in a reasonable sum or sums, for payment of the costs of transcribing the testimony.

Rule 59.—The costs of contest chargeable by registers and receivers are the legal fees for reducing testimony to writing. No other contest fees or costs will be allowed to or charged by those officers directly or indirectly.

Rule 60.—Contestants must give their own notices and pay the expenses thereof.

Rule 61.—Upon the termination of a trial, any excess in the sum deposited as security for the costs of transcribing the testimony will be returned to the proper party.

Rule 62.—When hearings are ordered by the Commissioner or by the Secretary of the Interior, upon the discovery of reasons for suspension in the usual course of examination of entries, the preliminary costs will be provided from the contingent fund for the expenses of local land offices.

Rule 63.—The preliminary costs provided for by the preceding section will be collected by the register and receiver when the parties are brought before them in obedience to the order of hearing.

Rule 64.—The register and receiver will then require proper provision to be made for such further notification as may become necessary in the usual progress of the case to final decision.

Rule 65.—The register and receiver will append to their report in each case a statement of costs and the amount actually paid by each of the contestants, and also a statement of the amount deposited to secure the payment of the costs, how said sum was apportioned, and the amount returned, if any, and to whom.

16.—Appeals from decisions rejecting applications to enter public lands.

Rule 66.—For the purpose of enabling appeals to be taken from the rulings or action of the local officers relative to applications to file upon, enter, or locate the public lands the following rules will be observed:

1. The register and receiver will indorse upon every rejected application the date when presented and their reasons for rejecting it.

2. They will promptly advise the party in interest of their action and of his right of appeal to the Commissioner.

157 3. They will note upon their records a memorandum of the transaction.

Rule 67.—The party aggrieved will be allowed thirty days from receipt of notice in which to file his appeal in the local land office. Where the notice is sent by mail, five days additional will be allowed for the transmission of notice and five for the return of the appeal.

Rule 68.—The register and receiver will promptly forward the appeal to the General Land Office, together with a full report upon the case.

Rule 69.—This report should recite all the facts and the proceedings had, and must embrace the following particulars:

1. A statement of the application and rejection, with the reasons for the rejection.

2. A description of the tract involved and a statement of its status, as shown by the records of the local land office.

3. References to all entries, filings, annotations, memoranda, and correspondence shown by the record relating to said tract and to the proceedings had.

Rule 70.—Rules 43 to 48, inclusive, and rule 93 are applicable to all appeals from the decisions of registers and receivers.

II.

Proceedings Before Surveyors General.

Rule 71.—The proceedings in hearings and contests before surveyors general shall, as to notices, depositions, and other matters, be governed as nearly as may be by the rules prescribed for proceedings before registers and receivers, unless otherwise provided by law.

III.

Proceedings Before the Commissioner of the General Land Office and Secretary of the Interior.

1.—Examination and argument.

Rule 72.—When a contest has been closed before the local land officers and their report forwarded to the General Land Office, no additional evidence will be admitted in the case, unless offered under stipulation of the parties to the record, except where such

evidence is presented as the basis of a motion for a new trial or in support of a mineral application or protest; but this rule will not prevent the Commissioner, in the exercise of his discretion, from ordering further investigation when necessary.

Rule 73.—After the Commissioner shall have received a record of testimony in a contested case, thirty days will be allowed to
158 expire before any action thereon is taken, unless, in the judgment of the Commissioner, public policy or private necessity shall demand summary action, in which case he will proceed at his discretion, first notifying the attorneys of record of his proposed action.

Rule 74.—When a case is pending on appeal from the decision of the register and receiver or survey or general, and argument is not filed before the same is reached in its order for examination, the argument will be considered closed, and thereafter no further arguments or motions of any kind will be entertained except upon written stipulation duly filed or good cause shown to the Commissioner.

Rule 75.—If before decision by the Commissioner either party should desire to discuss a case orally, reasonable opportunity therefor will be given in the discretion of the Commissioner, but only at a time to be fixed by him upon notice to the opposing counsel, stating time and specific points upon which discussion is desired; and, except as herein provided, no oral hearings or suggestions will be allowed.

2.—Rehearing and review.

Rule 76.—Motions for rehearing before registers and receivers, or for review or reconsideration of the decisions of the Commissioner or Secretary, will be allowed, in accordance with legal principles applicable to motions for new trials at law, after due notice to the opposing party.

Rule 77.—Motions for rehearing and review, except as provided in rule 114, must be filed in the office wherein the decision to be affected by such rehearing or review was made or in the local land office, for transmittal to the General Land Office; and, except when based upon newly-discovered evidence, must be filed within thirty days from notice of such decision.

Rule 78.—Motions for rehearing and review must be accompanied by an affidavit of the party, or his attorney, that the motion is made in good faith, and not for the purpose of delay.

Rule 79.—The time between the filing of a motion for rehearing or review and the notice of the decision upon such motion shall be excluded in computing the time allowed for appeal.

Rule 80.—No officer shall entertain a motion in a case after an appeal from his decision has been taken.

3.—Appeals from the Commissioner to the Secretary.

Rule 81.—An appeal may be taken from the decision of the Commissioner of the General Land Office to the Secretary of the Interior upon any question relating to the disposal of the public lands and

to private land claims, except in case of interlocutory orders and decisions and orders for hearing or other matter resting in the discretion of the Commissioner. Decisions and orders forming the above exception will be noted in the record, and will be considered by the Secretary on review in case an appeal upon the merits be finally allowed.

159 Rule 82.—When the Commissioner considers an appeal defective, he will notify the party of the defect, and if not amended within fifteen days from the date of the service of such notice the appeal may be dismissed by the Secretary of the Interior and the case closed.

Rule 83.—In proceedings before the Commissioner, in which he shall formally decide that a party has no right of appeal to the Secretary, the party against whom such decision is rendered may apply to the Secretary for an order directing the Commissioner to certify said proceedings to the Secretary, and to suspend further action until the Secretary shall pass upon the same.

Rule 84.—Applications to the Secretary under the preceding rule shall be made in writing, under oath, and shall fully and specifically set forth the grounds upon which the application is made.

Rule 85.—When the Commissioner shall formally decide against the right of an appeal, he shall suspend action on the case at issue for twenty days from service of notice of his decision, to enable the party against whom the decision is rendered to apply to the Secretary for an order, in accordance with rules 83 and 84.

Rule 86.—Notice of an appeal from the Commissioner's decision must be filed in the General Land Office, and served on the appellee or his counsel within sixty days from the date of the service of notice of such decision.

Rule 87.—When notice of the decision is given through the mails by the register and receiver or surveyor general, five days additional will be allowed by those officers for the transmission of the letter and five days for the return of the appeal through the same channel before reporting to the General Land Office.

Rule 88.—Within the time allowed for giving notice of appeal the appellant shall also file in the General Land Office a specification of errors, which specification shall clearly and concisely designate the errors of which he complains.

Rule 89.—He may also, within the same time, file a written argument, with citation of authorities, in support of his appeal.

Rule 90.—A failure to file a specification of errors within the time required will be treated as a waiver of the right of appeal, and the case will be considered closed.

Rule 91.—The appellee shall be allowed thirty days from the expiration of the sixty days allowed for appeal in which to file his argument.

Rule 92.—The appellant shall be allowed thirty days from service of argument of appellee in which to file argument strictly in reply, and no other or further arguments or motions of any kind shall be filed without permission of the Commissioner or Secretary and notice to the opposite party.

Rule 93.—A copy of the notice of appeal, specification of errors, and all arguments of either party, shall be served on the opposite party within the time allowed for filing the same.

160 Rule 94.—Such service shall be made personally or by registered letter.

Rule 95.—Proof of personal service shall be the written acknowledgment of the party served or the affidavit of the person making the service attached to the papers served, and stating time, place, and manner of service.

Rule 96.—Proof of service by registered letter shall be the affidavit of the person mailing the letter attached to a copy of the post-office receipt.

Rule 97.—Fifteen days, exclusive of the day of mailing, will be allowed for the transmission of notices and papers by mail, except in case of notice to resident attorneys, when one day will be allowed.

Rule 98.—Notice of interlocutory motions and proceedings before the Commissioner and Secretary shall be served personally or by registered letter, and service proved as provided in rules 94 and 95.

Rule 99.—No motion affecting the merits of the case or the regular order of proceedings will be entertained except on due proof of service of notice.

Rule 100.—*Ex parte* cases and cases in which the adverse party does not appear will be governed by the foregoing rules as to notices of decisions, time for appeal, and filing of exceptions and arguments, as far as applicable. In such cases, however, the right to file additional evidence at any stage of the proceedings to cure defects in the proof or record will be allowed.

Rule 101.—No person hereafter appearing as a party or attorney in any case shall be entitled to a notice of the proceedings who does not at the time of his appearance file in the office in which the case is pending a statement in writing, giving his name and post-office address and the name of the party whom he represents; nor shall any person who has heretofore appeared in a case be entitled to a notice unless within fifteen days after being requested to file such statement he shall comply with said requirement.

Rule 102.—No person not a party to the record shall intervene in a case without first disclosing on oath the nature of his interest.

Rule 103.—When the Commissioner makes an order or decision affecting the merits of a case or the regular order of proceedings therein he will cause notice to be given to each party in interest whose address is known.

4.—Attorneys.

Rule 104.—In all cases, contested or *ex parte*, where the parties in interest are represented by attorneys, such attorneys will be recognized as fully controlling the cases of their respective clients.

Rule 105.—All notices will be served upon the attorneys of record.

Rule 106.—Notice to one attorney in a case shall constitute notice

to all counsel appearing for the party represented by him, and notice to the attorney will be deemed notice to the party in interest.

161 Rule 107.—All attorneys practicing before the General Land Office and Department of the Interior must first file the oath of office prescribed by section 3478 United States Revised Statutes.

Rule 108.—In the examination of any case, whether contested or *ex parte*, and for the preparation of arguments, the attorneys employed, when in good standing in the department, will be allowed full opportunity to consult the record of the case and to examine the abstracts, plats, field-notes, and tract books, and the correspondence of the General Land Office or of the Department relative thereto, and to make verbal inquiries of the various chiefs of divisions at their respective desks in respect to the papers or status of said case; but such personal inquiries will be made of no other clerk in the division except in the presence or with the consent of the head thereof, and will be restricted to the hours between 11 a. m. and 2 p. m.

Rule 109.—Any attorney detected in any abuse of the above privileges or of gross misconduct, upon satisfactory proof thereof, after due notice and hearing, shall be prohibited from further practicing before the department.

Rule 110.—Should either party desire to discuss a case orally before the Secretary opportunity will be afforded at the discretion of the department, but only at a time specified by the Secretary or fixed by stipulation of the parties, with the consent of the Secretary, and in the absence of such stipulation or written notice to opposing counsel, with like consent, specifying the time when argument will be heard.

Rule 111.—The examination of cases on appeal to the Commissioner or Secretary will be facilitated by filing in printed form such arguments as it is desired to have considered.

5.—Decisions.

Rule 112.—Decisions of the Commissioner not appealed from within the period prescribed become final, and the case will be regularly closed.

Rule 113.—The decision of the Secretary, so far as respects the action of the Executive, is final.

Rule 114.—Motions for review before the Secretary of the Interior and applications under rules 83 and 84 shall be filed with the Commissioner of the Land Office, who will thereupon suspend action under the decision sought to be reviewed and forward to the Secretary such motion or application.

None of the foregoing rules shall be construed to deprive the Secretary of the Interior of the exercise of the directory and supervisory powers conferred upon him by law.

L. Q. C. LAMAR, *Secretary.*

162 AMENDMENTS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *October* 26, 1885.

Registers and receivers United States land offices.

GENTLEMEN: Rule 70 of rules of practice, approved August 13, 1885, is hereby amended to read as follows:

"Rule 70. Rules 43 and 48, inclusive, and rule 93 are not applicable to appeals from decisions rejecting applications to enter public lands."

WM. A. J. SPARKS,
Commissioner.

Approved October 26, 1885.
H. L. MULDROW,
Acting Secretary.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *December* 8, 1885.

Rule 81 of rules of practice, approved August 13, 1885, is hereby amended so as to read as follows:

"No appeal shall be had from the action of the Commissioner of the General Land Office affirming the decision of the local officers in any case where the party or parties adversely affected thereby shall have failed, after due notice, to appeal from such decision of said local officers.

"Subject to this provision an appeal may be taken from the decision of the Commissioner of the General Land Office to the Secretary of the Interior upon any question relating to the disposal of the public lands and to private land claims, except in case of interlocutory orders and decisions and orders for hearing or other
163 matter resting in the discretion of the Commissioner. Decisions and orders forming the above exception will be noted in the record, and will be considered by the Secretary on review in case an appeal upon the merits be finally allowed."

WM. A. J. SPARKS,
Commissioner.

Approved December 8, 1885.
H. L. MULDROW,
Acting Secretary.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *January* 11, 1886.

Rule 108 of rules of practice, approved August 13, 1885, is hereby amended so as to read as follows:

"In the examination of any case, whether contested or *ex parte*, the attorneys employed in said case, when in good standing in the

department, for the preparation of arguments, will be allowed full opportunity to consult the records of the case, the abstracts, field-notes, and tract books, and the correspondence of the General Land Office or of the department not deemed privileged and confidential; and whenever, in the judgment of the Commissioner, it would not jeopardize any public or official interest, may make verbal inquiries of chiefs of divisions at their respective desks in respect to the papers or status of said case; but such inquiries will not be made to said chiefs or other clerks of division except upon consent of the Commissioner, Assistant Commissioner, or chief clerk, and will be restricted to hours between 11 a. m. and 2 p. m."

WM. A. J. SPARKS,
Commissioner.

Approved January 11, 1886.
L. Q. C. LAMAR, *Secretary.*

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *March* 27, 1886.

Rule 114 of practice is amended to read as follows:

"Motions for a review of decisions of the Secretary should be filed with the Secretary, who may, in his discretion, suspend action on the decision sought to be reviewed until such motion shall be decided."

WM. A. J. SPARKS,
Commissioner.

Approved.
L. Q. C. LAMAR, *Secretary.*

164 DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *June* 14, 1888.

The following amendment, approved March 27, 1886, to rule 114 of practice, to wit:

Motions for a review of decisions of the Secretary should be filed with the Secretary, who may, in his discretion, suspend action on the decision sought to be reviewed until such motion shall be decided, is hereby revoked; and rule 114 of rules of practice, approved August 13, 1885, to wit:

Motions for review before the Secretary of the Interior, and applications under rules 83 and 84, shall be filed with the Commissioner of the General Land Office, who will thereupon suspend action under the decision sought to be reviewed, and forward to the Secretary such motion or application, will from this date be in force.

S. M. STOCKSLAGER,
Commissioner.

Approved June 14, 1888.
WM. F. VILAS, *Secretary.*

165 UNITED STATES LAND OFFICE,
SEATTLE, WASH., *June 17th*, 1890.

I, T. M. Reed, Jr., do certify that I am the duly qualified and acting register of the United States land office, Seattle, Washington, and custodian of the records thereof; that the records of said office show that Lemuel J. Holgate made homestead entry No. 204 on June 26th, 1863, and that said entry was duly allowed for lots 1 & 2, section 10, and S. W. ¼ of N. W. ¼, section 11, in township 25 north, of range 3 east, and that said entry remained uncancelled until the 20th day of December, 1871, at which last-mentioned time said entry was cancelled by letter of Hon. Commissioner of the General Land Office of date last aforesaid, and that said letter or a copy thereof is not among the files of this office. I further certify that I have no official seal.

T. M. REED, *Register*.

(Endorsed on back: *a* 6576. Offered by def'ts, but not admitted. xx. Filed June 19, '90. M. M. Holmes, clerk.)

166 Whereas by act of Congress approved 17th of July, 1854, two townships of land of thirty-six sections each, to be selected in legal subdivisions under direction of the legislature, shall be reserved for university purposes; and whereas by act of the legislature of Washington Territory passed January 11th, 1861, Daniel Bagley, John Webster, and Edmund Carr, all of King county, W. T., were constituted and appointed a board of commissioners authorized to make selection of lands reserved by Congress for university purposes, to make entry of such selections in the land office, and to sell the same for any sum not less than one dollar and fifty cents per acre; and whereas at a meeting of said commissioners held at Seattle, King county, Washington Territory, on the 22nd of February, 1861, the above-named Daniel Bagley was duly appointed president of said board, with power to act for and in behalf of said board, under the provisions of the law creating their appointment; and whereas the undermentioned tracts of land have been duly and properly entered in the land office as a portion of the said public land reserved for university purposes:

Now, therefore, this indenture, made the 10th day of March, in the year of our Lord one thousand eight hundred and sixty-four, between the above-mentioned Daniel Bagley, president of the board of commissioners and acting aforesaid, of the first part, and John Ross, of King county, Washington Territory, of the second part,

Witnesseth that the said party of the first part, for and in consideration of the sum of two hundred and forty (240) dollars, lawful money of the United States to him in hand paid at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, hath granted, bargained, sold, and con-
167 veyed, and by these presents doth grant, bargain, sell, and convey, unto the said party of the second part and to his heirs and assigns forever all the right, title, and interest vested in said board of commissioners by the laws of Congress and of this

Territory of and into lots one and two of section ten and southwest quarter of northwest quarter of section eleven, all in township twenty-five north, range three east, containing one hundred and sixty acres of land, more or less:

To have and to hold all and singular the above mentioned and described premises unto the said party of the second part, his heirs and assigns forever.

In witness whereof the said party of the first part hath hereunto signed his name and affixed his seal the day and date above written.

[D. B. L. S. 1864.]

DANIEL BAGLEY,
President of the Board of Commissioners.

Signed, sealed, and delivered in presence of—
SAML F. COOMBS.
W. E. BARNARD.

TERRITORY OF WASHINGTON, } ss:
3d Judicial District, County of King, }

On this 10th day of March, A. D. 1864, came Daniel Bagley, to me personally well known, and acknowledged that he executed the same for the uses and purposes therein mentioned.

Witness my hand and seal the day and date last above written.

[SEAL.] SAML F. COOMBS,
Notary Public, W. T.

Recorded Feb'y 4th, 1864.

GARDNER KELLOGG,
Auditor, King County, W. T.

168 TERRITORY OF WASHINGTON, } ss:
County of King, }

I, W. R. Forrest, auditor of King county, Washington Territory, and *ex officio* recorder of deeds in and for said county, do hereby certify the above and foregoing to be a full, true, and correct copy of a deed from Daniel Bagley, president, &c., to John Ross, as the same appears of record in my office in vol. 1 of Deeds, pages 239 & 240, records of King county; and I do further certify that the instrument immediately preceding this instrument and recorded on pages 237 & 238 of said vol. 1 of Deeds is endorsed, recorded Feb'y 2nd, 1865; that the instrument immediately preceding said last-named instrument & recorded on pages 235 & 236 is endorsed, "recorded Jan'y 24, 1865," and that the instrument immediately following this instrument & recorded on pages 241 & 242 of said vol. 1 of Deeds is endorsed, "recorded Feb'y 4th, 1865," and the instrument immediately following said last-mentioned instrument and recorded on pages 242 & 243 of said vol. 1 of Deeds is endorsed, "recorded Feb'y 4th, 1865;" and I do further certify that on Feb'y 4th, 1864, Sam'l F. Coombs was the county auditor of said King county, Wash. T'y.

In witness whereof I have hereunto set my hand and affixed my official seal this 18th day of May, A. D. 1889.

[Seal of Auditor, King County, W. T.]

W. R. FORREST,
Auditor, King County, W. T.

(Endorsed on back: 6576—F—X. Df'ts' ex., offered but not admitted. A. C. B. Filed June 18, '90. M. M. Holmes, clerk.)

169 UNITED STATES OF AMERICA, }
State of Iowa. }

Be it remembered that at a term of the circuit court held in the city of Clinton, Clinton county and State of Iowa, on the 26th day of Sept., A. D. 1876, Mr. John Keane, a native of Ireland, exhibited a petition praying to be admitted to become a citizen of the United States, and it appearing to the satisfaction of the said court that he had declared on oath, according to the laws of the United States, two years previous to this date that it was his *bona fide* intention to become a citizen of the United States, and to renounce forever all allegiance and fidelity to every foreign prince, potenate, State, or sovereignty whatsoever, and particularly the Queen of Great Britain and Ireland, of whom he was at that time a subject, and the said John Keane, having on his solemn oath in open court declared and also made proof thereof by competent testimony that he had resided one year and upwards within the State of Iowa and within the United States of America upwards of five years immediately preceding his application, and it appearing to the satisfaction of the court that during that time he had behaved as a man of good moral character, attached to the Constitution of the United States and well disposed to the good order and happiness of the same, and having on his solemn oath declared before said court that he would support the Constitution of the United States, and that he did absolutely and entirely renounce and abjure all allegiance and fidelity to every foreign prince, power, potentate, state, and sover-
170 eignty whatever, and particularly to the Queen of Great Britain and Ireland, of whom he was before a subject:

Therefore the court admitted the said John Keane to become a citizen of the United States and ordered all the proceedings aforesaid to be entered on the record of the court, which was accordingly done.

In testimony whereof I, the undersigned, clerk of the court aforesaid, have hereunto set my hand and caused the seal of the said circuit court to be hereunto annexed this 26th day of September, A. D. 1876.

Seal of the Circuit Court of Iowa, Clinton County.

W. B. LEFFINGWELL, *Clerk.*

(Endorsed on back: A 6576. Df'ts' Ex. 7. A. C. B. Used in hearing & filed June 19, '90. M. M. Holmes, clerk.)

171 UNITED STATES LAND OFFICE,
SEATTLE, W. T., *April* 4, 1889.

John Keane, c. o. John Arthur, Seattle, W. T.

SIR: We are in receipt of Hon. Commissioner's letter "C," dated Jan'y 28th, 1889.

In the matter of your appeal from the decision of this office of Nov. 5, 1888, reporting for cancellation said homestead entry No. 10604 for the S. W. ¼ N. W. ¼ sec. 11, t'p 25 N., R. 3 E., the Hon. Commissioners says:

"The action of your office was taken on the ground that the land in question had been selected for university purposes, and also that the application of one Frank Tollotson for the same tract rejected by you Sept. 15th, 1886, is now pending on appeal before this office.

Appellant specifies as errors that the report for cancellation is the action of the register alone and not the joint action of the two local officers; that the territorial selection is void on account of a prior entry of the same tract remaining uncancelled at date of selection, and that Tollotson's attempted entry is fraudulent.

The notice that cancellation had been recommended, a copy of which accompanies the appeal, is signed by the register only. While the concurrence of both officers is necessary to the validity of any judicial act within the jurisdiction of the local office, reporting an entry for cancellation is not such an act.

172 Appellant claims that the university selection was *ab initio* void, as having been made in the presence of one Holgate's entry uncancelled on the record. The fact, however, that Holgate's relinquishment was executed before the selection was held sufficient to validate the entry by Secretary Teller in the case of Fred. Jenson, June 19, 1883, who attached the selection on the same ground, and the Secretary adds: The fact that Holgate's relinquishment was not returned to and noted on your records until 1871 shows irregularity on the part of the local officers, but cannot affect the right of the university.

I am therefore of the opinion that the university selection is valid, which makes it unnecessary to consider the merits of Tollotson's application.

Keane's entry is accordingly held for cancellation."

You are hereby notified of the above decision and allowed 60 days in which to appeal and 10 days for mailing.

Respectfully,

—— ——, *Register.*
H. E. SHIELDS, *Receiver.*

(Endorsed on back: A 6576. D'f'ts' 2 x 4. A. C. B. Used in hearing & filed June 19, 1890. M. M. Holmes, clerk.)

173 UNITED STATES LAND OFFICE,
OLYMPIA, WASH. TER., *July 12th*, 1882.

Mr. John Schweitzer, Seattle, W. T.

SIR: We herewith transmit to you a letter of the Hon. Commissioner of the General Land Office, marked "G" and date- June 26th, 1882, which reinstates your h'd entry No. 3566 as therein set forth.

Very respectfully,

JOHN F. GOWEY, *Register.*
ROBERT G. STUART, *Receiver.*

Copy.

Refer in repl'g to this initial "G."

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *June 26th*, 1882.

Register & receiver Olympia, W. T.

GENTLEMEN: I am in receipt of a letter from John Schweitzer, dated at Seattle, W. T., the 27th ultimo, relative to the cancellation of his homestead entry No. 3566, for lot 2, sec. 10, t'p 25 N., R. 3 E., for conflict with selection by the territorial authorities for lots 1 & 2 of said sec. March 10, 1864.

Upon examination of said selection I find that at date thereof said tracts were covered by homestead entry No. 204 of Lemuel J. Holgate, made June 26, 1863; which entry was not cancelled until December 20, 1871.

174 Said selection was therefore invalid and void *ab initio*, the land not being subject to selection. It follows that the cancellation of Mr. Schweitzer's entry for conflict with said invalid selection was error, and the same is hereby reinstated, of which action you will advise the claimant.

You will also advise the proper territorial authorities that said selection is held for cancellation for the reason stated, subject to appeal within sixty days, and you will promptly report the action taken at the expiration of said period.

Very respectfully,

(Signed) N. C. McFARLAND,
Commissioner.

(Endorsed on back: A 6576—2. Decision of C. G. L. O. June 26, 1882. Notice from register July 12, 1882. D'f'ts' Ex. 3. A. C. B. Used in hearing & filed June 18, 1890. M. M. Holmes, clerk.)

175 (4-138.)

Receiver's duplicate receipt No. 10604; application No. 10604.

Homestead.

RECEIVER'S OFFICE,
SEATTLE, W. T., *Oct.* 20, 1888.

Received of John Keane the sum of six dollars & 50 cents, being the amount of fee and compensation of register and receiver for the entry of S. W. ¼ N. W. ¼ of section 11, in township 25 N., of range 3 E., under section 2290, Revised Statutes of the United States, 40 acres, *@* 1.25.

H. E. SHIELDS, *Receiver.*

$6.50.

NOTE.—It is required of the homestead settler that he shall reside upon and cultivate the land embraced in his homestead entry for a period of five years from the time of filing the affidavit, being also the date of entry. An abandonment of the land for more than six months works a forfeiture of the claim. Further, within two years from the expiration of the said five years he must file proof of his actual settlement and cultivation, failing to do which, his entry will be canceled. If the settler does not wish to remain five years on his tract he can, at any time after six months, pay for it with cash or land warrants upon making proof of settlement and cultivation from date of filing affidavit to the time of payment.

176 [Endorsed:] 23660. Rec. rec'pt 2681. United States / *vs.* John Keane. / Filed for record at the request of John Keane Oct. 22d, A. D. 1888, at 42 min. past 8 a. m., and recorded in vol. one of Patents, page 212, records of King county, W. T. Lyman Woods, Co. auditor, by —— ——, deputy. 30c., p'd. A 6576. Z. D'f'ts' Ex. 2. A. C. B. Used in hearing & filed June 18, '90. M. M. Holmes, clerk.

177 A 6576.
D'f'ts' Ex. C.
A. C. B.
Used in hearing & filed June 19, '90.
M. M. Holmes, clerk.

Department of the Interior,
United States Land Office,
Seattle, W. T.
Official business.
Any person using this envelope to avoid the payment of postage on private matter of any kind will be subject to a fine of three hundred dollars.

JOHN KANE,

c. o. John Arthur,

Seattle,

W. T.

Register of Homestead Entries.

Register of Entries Made at the Land Office at Olympia, Wash. Ter., under the Homestead Laws, from the — Day of ——, 188–, to the — Day of the Same Month, Inclusive.

No. of application.	Date of application.	Tract entered. Section or part of section.	No. of section.	No. of township.	No. of range.	Quantity. Acres.	Quantity. 100ths.	Name of applicant.	Residence.	Fees	Commissions.	Rate per acre.	Remarks.
*	*	*	*	*	*	*	*	*	*		*		
204	June 26th, 1863.	S. W. ¼ N. W. ¼.	11	25 N....	3 E....	.....	.....	.....	.....	.....	.....	.....	Cancelled Dec. 20, 1871, by C. G. L. O.
		Lots No. 1 & 2.	10	.....	.....	153	80	Lemuel J. Holgate..	King Co., W. T.	.....	.....	.....	Abandoned. Receipt returned.
*	*	*	*	*	*	*	*	*	*		*		
3566	Dec. 18th, 1879.	Lot 2. Cancelled.	10	25	3 E....	54	80	John Schweitzer.....	King Co., W. T.	5 —	3 —	1 25	Cancelled May, 1882. Letter "C," May 5, 1882. Cr. for fees, &c., paid. Sec. 2304 R. S., H'd D. S. 44. Reinstated June 26, 1882. Letter "G," June 26, 1882. Copy of discharge shows enlistment for 3 years, Co. "A," 3 Ills. Cav., Aug. 14, 1861. Discharged M'ch 10, 1863, for disability.

United States Land Office, Olympia, W. T., *September 30th*, 1882.

I, John F. Gowey, register of the U. S. land office at Olympia, Wash. Terr'y, do hereby certify that the foregoing is a full and correct copy of the records in this office as shown by the register of homestead entries as to applications Nos. 204 and 3566, and I hereby further certify that I have no seal of office.

JOHN F. GOWEY, *Register.*

[Endorsed:] A 6576—2. Used in hearing & filed June 18, '90. M. M. Holmes, clerk.

179 In the Superior Court of King County, State of Washington.

ANN SOPHIA BRYGGER, Executrix, and OLE SCHILLESTAD, Executor, of the Estate of John Brygger, Deceased, Plaintiffs,
vs.
JOHN KEANE, Defendant.
No. 6576.

STATE OF WASHINGTON, *County of King*, } ss:

I, W. B. Spencer, county clerk and *ex officio* clerk of the superior court of King county, do hereby certify that the foregoing bundle of exhibits is the bundle referred to as Exhibits No. 2 in my certificate of this date to the transcript in cause Brygger *vs.* Keane for supreme court.

In witness whereof I have hereunto set my hand and affixed the seal of said superior court this 12th day of May, 1891.

[Seal of the Superior Court of King County, Washington.]

W. B. SPENCER,
County Clerk.

180 [Endorsed:] 6576. 217. ≠6576. 6576. Exhibits 1, 2, 3, 4, 5, 6, 7 * * * Filed June 19, 1890. M. M. Holmes, clerk. Bundle Exhibits Number (2) Two. Filed May 22, 1891. C. S. Reinhart, clerk.

181 In the Supreme Court of the State of Washington.

NOVEMBER 12, 1891.

JOHN KEANE, Appellant,
vs.
ANNA SOPHIA BRYGGER *et al.*, Respondent.
217.

This cause coming on to be heard by the court on the transcript of the record of the superior court of King county and upon the argument of counsel, the cause was submitted and taken under advisement.

Entered, pg. 474, Record, vol. I.

182 JOHN KEANE, Appellant,
v.
ANNA SOPHIA BRYGGER, Executrix, and OLE Schillestad, Executor, of the Estate of Johan Brygger, Deceased, Respondents.
No. 217. Filed Dec. 16, 1891.

We will first notice the contention of the appellant that the land in controversy from June 26th, 1863, to December 20th, 1871, was segregated from the public domain and was not subject to be selected for university purposes during that time. This contention is founded on the fact that the said land was embraced in the homestead entry of one Lemuel J. Holgate made and duly entered in

the proper land office on June 26th, 1863, and was not cancelled until December 20th, 1871. The testimony shows that Holgate executed a relinquishment to the land before the alleged selection of the university. This is shown by the testimony of Daniel Bagley, who, as president of the board of university commissioners, executed the deed to Ross. Mr. Bagley testified as follows:

"I saw the relinquishment before I filed the selection in the land office or sold to Ross.

Question. Do you know what became of the relinquishment?

Answer. I filed it or had it filed in the land office at Olympia."

This testimony is substantiated by the petition for a new trial, wherein it appears that a paper purporting to be the receiver's duplicate receipt issued to Lemuel J. Holgate for the land in controversy was filed in the General Land Office, and that said paper was endorsed as follows:

"SEATTLE, KING COUNTY, *February 16th*, 1864.

183 I hereby relinquish all my right and title to the within-described land in favor of John Ross.

(Signed) LEMUEL J. HOLGATE."

It is claimed, however, that this was not a relinquishment as required by law, but is in effect a quitclaim from Holgate to Ross, and that in fact there was no provision for a voluntary relinquishment in any manner prior to May 14th, 1890, but that the only way by which lands once filed on under the homestead, pre-emption, or timber-culture acts could be restored to the public domain was either by lapse of time or by contest.

This position, we think, is not in accord with either the spirit or letter of the law or the custom or usage of the Land Department. Section 1 of the act of May 14th, 1880, is as follows: "Be it enacted, etc., etc., that when a pre-emption, homestead, or timber-culture claimant shall file a written relinquishment of his claim in the local land office the land covered by such claim shall be held as open to settlement and entry without further action on the part of the Commissioner of the General Land Office." All the effect this law had was to give authority to local land officers to cancel the entry at once without awaiting the action of the Commissioner of the General Land Office, which was the practice before its passage. It has always been the uniform practice of the Land Department to cancel entries on the voluntary relinquishment of the entryman, and it would be a strange doctrine to announce that a party did not have the right to relinquish any right that he had to or in any property, and that it was the intention of the Government to compel its citizens to go to the expense and delay of a contest to extinguish an interest of another citizen who was willing to make a disclaimer of that interest. The object of the homestead law was to
184 furnish homes to the citizens of the Government and to encourage the settlement of its public domain, and to make the accession of those homes as easy and cheap as possible, and not to wantonly and senselessly place obstructions in the way of

such acquisition. Of course the policy of the Government is to protect the rights of the homestead claimant while he is endeavoring to comply with the requirements of the law; but when the Government becomes satisfied that there has been an abandonment of such right by the applicant the entry will be cancelled and the land will be subject to the re-entry of some one who will comply with the law. The question whether or not there has been an abandonment must be determined, like every other question of the kind, by evidence, and there certainly could be no higher or more convincing testimony than the testimony of the applicant himself, by a formal relinquishment of his rights to the land, endorsed on his original receipt and filed in the land office. After this proof of abandonment it would certainly be a useless form to require a contest to prove the very thing that was admitted and asserted by the original entryman.

Sec. 2297 of the Revised Statutes, which appellant claims was the only law in force up to May 14th, 1880, in no sense conflicts with the idea of a voluntary relinquishment, but is in perfect harmony with that practice. It is as follows:

"SEC. 2297. If, at any time after the filing of the affidavit, as required in section twenty-two hundred and ninety, and before the expiration of the five years, mentioned in section twenty-two hundred and ninety-one, it is proved, after due notice to the settler, to the satisfaction of the register of the land office that the person having filed such affidavit has actually changed his residence, or abandoned the land for more than six months at any time, then and in that event the land so entered shall revert to the Government."

This section, it is true, provides for a contest, and the
185 proper officers of the Land Department, by virtue of their supervisory powers, prescribed rules and regulations governing this contest; but this section is not exclusive and will only be invoked when necessary. If the homestead applicant has abandoned his claim and has gone or if he has not complied with the law and refuses or fails to relinquish, this section prescribes the remedy, but there can be no such thing as a contest with one who will not contest, but is willing to and does grant everything that is asked of him. It might as well be claimed that a settler could not waive notice because the words "after due notice to the settler" occur in the section, as to hold that he could not waive the proofs required. The proof of abandonment is the essential thing required; and even the wording of the section literally construed would make the relinquishment sufficient proof in that kind of a proceeding, and the cases cited by appellant are not in any sense opposed to this view. While in some cases certain segregated remarks of the court might possibly lead to such a conclusion, yet in every instance when the facts of the case are examined it is found that the opinion was based on the theory that there had been no abandonment proved at all, either by voluntary relinquishment or by contest proceedings. Many of these cases have been decided since the act of May 14th, 1880, and the language used is the same and they in no way tend to establish the doctrine that there cannot be a voluntary re-

linquishment; but the doctrine announced is that the fact of the abandonment must be established before the entry can be cancelled.

In the case of Kansas Pac. R. R. Co. *v.* Dunmeyer, 113 U. S., 629, it was decided that under the act granting lands to aid in the construction of a line of railroad from the Missouri river to
186 the Pacific ocean the claim of a homestead or pre-emption entry made at any time before the filing of the map in the General Land Office had attached, within the meaning of those statutes, and no land to which such right had attached came within the grant, and that the subsequent failure of the person making such claim to comply with the acts of Congress concerning residence, cultivation, and building on the land or whose actual abandonment of the claim does not cause it to revert to the railroad company and become a part of the grant. The claim having attached at the time of filing the definite line of the road, it did not pass by the grant, but was by its express terms excluded and the company had no interest, reversionary or otherwise, in it. Many questions entered into the consideration of that case that are not in the case at bar, and that case was mainly decided on the special restrictions in the granting law, such as, for instance, "not sold, reversed, or otherwise disposed of by the United States and to which a pre-emption or homestead claim might not have attached at the time the line of said road is definitely filed," and the further declaration that the grant "shall not defeat or impair any pre-emption, homestead, swamp-land, or other lawful claim," but nothing in that decision touches this case. In speaking of the effect of the homestead application the court said, "It meant that by such a proceeding a right of homestead had fastened to that land which could ripen into a perfect title by future residence and cultivation," and a long line of authorities, including Hastings & Dakota Railway Co. *v.* Whitney and all the other cases cited by appellant on this point, hold substantially the same doctrine, and it is not
187 disputed that so long as the homestead entry valid upon its face remains a subsisting entry that it is such an appropriation of the tract as segregates it from the public domain; but Holgate's entry was not a subsisting entry and could not ripen into a perfect title by future residence or cultivation, for by his own act he had precluded such a consummation and his rights to perfect title to that land were as effectually gone as though a contest had been decided against him, and every case cited by appellant is decided on the theory that the applicant's abandonment had not been proven in any manner whatever, either by contest or relinquishment, and no case can be found which holds that a voluntary relinquishment is not sufficient authority to the land department to cancel an entry and restore the land to the public domain.

The particular form of the relinquishment is of very little importance, and where the department has been satisfied no court that we know of has ever interfered. The thing to be ascertained is whether or not the applicant intended to relinquish his right. If this can be gathered, all statements to the effect that the relinquishment is made in favor of a particular person will simply be treated

as surplusage. Such has been the universal practice of the department and we think has never been questioned. It is true that Holgate's relinquishment was not acted on in this case until 1871, after the selection for the university, but the fact remains that the relinquishment was executed by Holgate February 16th, 1864, prior to the selection of the university lands, and according to the testimony of Bagley was filed in the proper local land office prior to such selection. The law had been fully complied with so far as the university commissioners were concerned. They had seen to it that the relinquishment had been filed in the
188 proper land office, and they had no further jurisdiction over it and could no longer be responsible for it. This was the view taken by the land department, and we cannot do better than to quote the language of Secretary Teller when he says, in relation to the Fred. Jenson entry, who was attacking the selection of the university on the same grounds: "The fact that Holgate's relinquishment was not returned to and noted on your records until 1871 shows irregularity on the part of the local officers, but cannot effect the right of the university." This language was quoted by Commissioner Stockslager in sustaining the rejection to Keane's entry to the same land in January, 1889, and, it seems to us, is so manifestly in accord with justice and proper rules governing its administration that it needs no discussion or argument to sustain it.

The deed from the university commissioners to Ross was executed March 10th, 1864, and whatever irregularities there were in that deed, if any, were cured by the act of Congress of March 14th, 1864, U. S. Stat. at Large, vol. 13, p. 28. Said section reads as follows:

"Whereas, it is declared in the fourth section of the act of Congress approved July 17th, 1854, amendatory of the act approved September twenty-seventh, eighteen hundred and fifty, creating the office of surveyor general of the public lands in Oregon, etc., 'that in lieu of the two townships of land granted to the Territory of Oregon, by the tenth section of the act of eighteen hundred and fifty, for universities, there shall be reserved to each of the Territories of Washington and Oregon, two townships of land of thirty-six sections each, to be selected in legal subdivisions, for university purposes, under the direction of the legislatures of said Territories, respectively;' and

Whereas, it is represented that sales have been made by territorial authorities of lands selected in virtue of the terms of said act of seventeenth July, eighteen hundred and fifty-four, authorizing selections to be 'reserved,' merely, under the conviction that they had the power to dispose of the same as a fee-simple grant:

Therefore, be it enacted, etc. That in all cases of sales made to individuals by the territorial authorities prior to the passage
189 of this act, in which it may be shown to the satisfaction of the Secretary of the Interior that such sales were *bona fide* and of the class hereinbefore mentioned, and that the tracts so sold are selections in all other respects regular and proper, it shall and

may be lawful for the said Secretary to approve such selection as a grant in fee-simple, and a transcript, certified under the seal of the General Land Office by the Commissioner thereof, of such approval, shall vest the title in the Territory, and in its *bona fide* vendees."

It is stoutly urged by the appellant that no selection was made of the land in controversy in the manner specified by law; that plat No. 2 was not filed in the land office until March 5th, 1867, after the passage of the law by the territorial legislature January 31st, 1867, removing Daniel Bagley and others as university commissioners, and that consequently such filing and selection were without authority of law and void. So far as the action of the Territory is concerned, its legislative intent was pretty plainly expressed in an act entitled "An act to confirm titles to university lands in Washington Territory," approved October 26th, 1875. Section 1 of said act provides:

"That all deeds of conveyance for university lands in this Territory, which have been executed since the passage of the act entitled 'An act to provide for the selection and location of the land reserved for university purposes, to appoint a board of commissioners, and to provide for the selection and location of a site for the territorial university,' passed on the eleventh day of January one thousand eight hundred and sixty-one, in the name of Daniel Bagley, president of the board of university commissioners, instead of being executed in the name of the Territory of Washington, shall be deemed, taken and held good and valid deeds in law; and shall have the force and effect to pass from the Territory of Washington to the purchaser or purchasers named in such deeds respectively, their heirs, executors, administrators and assigns, all the right, title and interest then vested, or which may hereafter be vested in the Territory of Washington, in and to the lands described in said deeds, as though in each and all respects the deeds in their form and manner of execution had conformed to the requirements of law."

Of course, there is no disputing the contention of appellant that the Territory had no authority to pass any act to convey
190 title out of the United States; nor is it contended here that there was any such attempt on the part of the Territory, but it was an attempt, so far as the interests of the Territory were concerned, to cure all irregularities in the Commissioner's deeds and to pass the titles to *bona fide* purchasers; and the United States had the same object in view in the curative act of March 14th, 1864, and as both the United States and the Territory saw fit to provide by statute for confirming the titles to these lands in *bona fide* purchasers years before any attempt was made by the appellant to obtain title to them, it certainly does not lie in his mouth to complain or object. It is said that no action was taken, as shown by the record in the case at bar, in compliance with the requirements of the statutes granting university lands. The plaintiff, however, did introduce a certified copy of the approval of such selections by the Secretary of the Interior. The certificate of approval referring to the list embracing the land in question is as follows:

"DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, *April* 20, 1889.

"It is hereby certified that the tracts described in the foregoing list are embraced in the original list on file in this office of lands selected in the Olympia, now Seattle, land district, Washington Territory, by a duly authorized agent of said Territory, under the provisions of the above-cited acts of Congress approved July 17, 1854, and March 14, 1864.

It is further certified that the said tracts have been examined and compared with the township plat and tract book of this office and are found to be subject to selection and free from conflicts, and satisfactory proof having been furnished this office of the *bona fide* sale of the land by the territorial authorities, and the selections being in every respect regular, proper, and in accordance with the provisions of the above-named act of Congress of March 14th, 1864, it is therefore recommended that the list, embracing 99 acres, be approved as a grant in fee-simple of the land therein described to the said Territory of Washington, said approval being subject to
191 any valid interfering rights which may have existed at the date of selection.

S. M. STOCKSLAGER,
Commissioner.

DEPARTMENT OF THE INTERIOR, *April* 22, 1889.

The foregoing list of university selections, embracing 99 acres, is hereby approved as a grant in fee-simple of the land therein described to the Territory of Washington, said approval being subject to any valid interfering rights which may have existed at the date of selection.

JOHN W. NOBLE, *Secretary.*"

This finding was authorized by the act of March 14, 1864, which constituted the Secretary of the Interior a tribunal to judicially pass upon the very questions passed upon by the Secretary of the Interior in this case. The language of the act is, "in which it may be shown to the satisfaction of the Secretary of the Interior that such sales were *bona fide*," etc., and when the requirements therein specified are shown to the satisfaction of the Secretary of the Interior the title shall vest in the Territory and its *bona fide* vendees. The certificate shows that these requirements have been performed to the satisfaction of the Secretary, and the transcript of approval has been certified in a manner prescribed by law, and upon the certificate of such approval the title vested in the Territory and its *bona fide* vendees. Here is an officer constituted by the Government the sole judge of certain facts, and judicial authority and discretion conferred upon him as a tribunal in language plain and unmistakable. The proof tending to show the *bona fides* of the sale, the class of the land, and the regularity of the sale must be submitted to the tribunal, and if the proof is made to the satisfaction of such tribunal the approval will be made and not otherwise, and when the approval is made, in the absence of fraud, it will be con-

clusive. The decree of the Secretary is the final adjudication upon the question of right, and all action after that is merely in
192 the execution and enforcement of that right. It is a well-established rule governing all the departments of the Government that where a special tribunal is authorized to hear and determine certain matters arising in the course of its duties its decisions within the scope of its authority are conclusive.

Johnson *v.* Towsley, 13 Wallace, 72.

In French *v.* Fyan *et al.*, 93 U. S., 169, a patent has been issued to the State of Missouri for swamp lands under a certain act of Congress. In an action for ejectment by a party claiming title under a grant from a railroad company, which would have carried the title if the land were not swamp and overflowed, it was offered to prove that the land was not of that character. It seems to us that it was very nearly a parallel case with this one, and in that case the court said:

"We are of opinion that, in this action of law, it would be a departure from sound principles and contrary to well-considered judgments in this court and in others of high authority to permit the validity of the patent to the State to be subjected to the test of the verdict of a jury on such oral testimony as might be brought before it. It would be constituting the jury or the court sitting as a jury for the tribunal which Congress had provided to determine the question, and would be making a patent of the United States a cheap and unstable reliance as a title for lands which it purported to convey."

In Quinby *v.* Conlan, 104 U. S., 420, the court said: "It would lead to endless litigation and be fruitful of evil if a supervisory power were vested in the courts over the action of the numerous officers of the Land Department on mere questions of fact presented for their determination."

In Vance *v.* Burbank, 101 U. S., 514, it was decided that the decisions of the appropriate officers of the Land Office, who had been constituted a special tribunal to decide certain questions, were final to the same extent as those of judicial or quasi judicial tribunals were.

See also United States *v.* Flint, 4 Sawyer, 42.
193 Warren *v.* Van Brunt, 19 Wallace, 646.
Shepley *v.* Cowan, 91 U. S., 330.
Moore *v.* Robbins, 96 U. S., 530.
Marquez *v.* Frisbie, 101 U. S., 473

Many of these cases were reviewed and the doctrine reaffirmed in Steele *v.* Smelting Co., 106 U. S., 447. It is true that in this case the approval of the list embracing this land was not made until April 22nd, 1889, while appellant's entry was made October 20th, 1888, but the approval relates back to the time of the selection. The allowance of appellant's entry was a mere inadvertence on the part of the land officers, and was corrected as soon as the true state of the record was discovered. By such inadvertence he could

certainly obtain no vested rights as against the *bona fide* purchaser of the land. All these statutes have been construed by those whom the law specially appointed to construe and execute them, and it is a principal well recognized by the courts that the construction given to statutes by those charged with the duty of executing them should not be overruled without cogent reasons.

United States *v.* Moore, 95 U. S., 760.

In that case the court said: "The officers concerned are usually able men and masters of the subject; not unfrequently they are draftsmen of the laws they are afterwards called upon to interpret."

In Brown *v.* U. S., 113 U. S., 568, it was announced that in cases of ambiguity in a statute contemporaneous and uniform executive construction is regarded as decisive.

To the same effect is Edwards' Lessee *v.* Darby, 12 Wheat., 194 210; U. S. *v.* State Bank of North Carolina, 6 Peters, 29; McSorley *v.* Hill, 2nd Wash. * * *

So far as appellant's claim to the right of trial by jury is concerned, it seems that this case was treated by him at the trial below as an equitable action, and that he interposed an equitable defense to the complaint, and that both parties voluntarily went to trial without a jury. Whether in a case where this question was properly presented this court would hold that a party waived his right of trial by jury by proceeding to the trial of the cause by the court without demanding a jury and without interposing any objection, we do not now decide nor indicate; but in this case the alleged error was not brought to the attention of the court in the motion for a new trial, and in any event it would be error without prejudice, for the testimony which was submitted by the plaintiff and which was necessary to prove his claim was undisputed by the applicant, excepting so far as its admissibility, its construction, and its legal effect were concerned, which were purely legal questions to be decided by the court. Other testimony, it was true, was admitted, but there was no disputed testimony the admission of which was necessary to a rightful determination of the issues involved. The points discussed above were mainly relied upon by appellant to reverse this judgment. However, we have examined the other points raised in the different briefs filed by appellant and fail to find any error. We think the findings of fact were borne out by the testimony, and that the conclusions of law were justified by such findings.

The judgment is, therefore, affirmed.

DUNBAR, *J.*

We concur.

ANDERS, *C. J.*
SCOTT, *J.*
HOYT, *J.*
STILES, *J.*

195 In the Supreme Court of the State of Washington.

WEDNESDAY, *Dec.* 16, 1891.

JOHN KEANE, Appellant,
vs.
ANNA SOPHIA BRYGGER, Executrix; OLE SCHILLESTAD, Etc., Respondents. } No. 217.

This cause having been heretofore submitted to *to* the court upon the transcript of the record of the superior court of King county and upon the argument of counsel, and the court having fully considered the same and being fully advised in the premises and having filed its opinion in writing, it is now, on this 16th day of December, A. D. 1891, on motion of Jacobs, Jenner & W. Lair Hill, of counsel for respondent, considered, adjudged, and decreed that the judgment of said superior court be, and the same is hereby, affirmed with costs, and that the said Anna Sophia Brygger, executrix, and Ole Schillestad, executor, of the last will and testament of John Brygger, deceased, have and recover of and from the said John Keane the costs of this action, taxed and allowed at — dollars, and that execution issue therefor; and it is further ordered that this cause be remitted to the said superior court for further proceeding, in accordance with the opinion herein filed.

Entered, pg. 521, Record, vol. I.

196 In the Supreme Court of the State of Washington.

MONDAY, *January* 11, 1892.

JOHN KEANE, Appellant,
vs.
ANNA SOPHIA BRYGGER *et al.*, Respondents.

This cause coming on to be heard by the court on the petition of the appellant herein for a rehearing, and the court, having fully considered the matter and being fully advised in the premises, now orders that the petition be, and it is hereby, denied.

Entered, pg. 543, Journal, vol. I.

197 In the Supreme Court of the State of Washington.

JOHN KEANE, Appellant,
vs.
ANNA SOPHIA BRYGGER *et al.*, Respondents.

STATE OF WASHINGTON, *County of Thurston*, } *ss.*:

I, C. S. Reinhart, clerk of the supreme court of the State of Washington, do hereby certify that the above and foregoing is a full, true, and correct copy of so much of the record in the above-entitled cause as has been demanded of me by the appellant herein.

Seal of the Supreme Court, State of Washington.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Olympia, this 26th day of January, A. D. 1892.

C. S. REINHART, *Clerk.*

198 UNITED STATES OF AMERICA, *ss:*

To Anna Sophia Brygger, executrix, and Ole Schillestead, executor, of the estate of Johan Brygger, deceased, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 60 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Washington, wherein John Keane is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Stephen J. Field, associate justice of the Supreme Court of the United States, this eleventh day of February, in the year of our Lord one thousand eight hundred and ninety-two.

STEPHEN J. FIELD,
Associate Justice of the Supreme Court of the United States.

199 STATE OF WASHINGTON, } *ss:*
County of King, }

On this 26th day of February, in the year of our Lord one thousand eight hundred and ninety-two, personally appeared before me the subscriber, James Gill, and makes oath that he delivered a true copy of the within citation to Anna Sophia Brygger, executrix, and Ole Schillestead, executor, of the estate of Johan Brygger, deceased.

JAMES GILL.

Sworn to and subscribed the 26th day of February, A. D. 1892.

{ Seal of John E. Humphries, Notary Public, State of Washington. Commission expires June 13, 1894. }

JOHN E. HUMPHRIES,
Notary Public in and for the State of Washington, Residing at Seattle.

[Endorsed:] To be sent up by the clerk with the record.

200 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the honorable the judges of the supreme court of the State of Washington, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, be-

fore you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between John Keane, appellant, and Anna Sophia Brygger, executrix, and Ole Schillestead, executor, of the estate of Johan Brygger, deceased, appellees, wherein was drawn in question the validity of a statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution or of a
201 treaty or statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said appellant, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington within 60 days from the date hereof, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the eleventh day of February, in the year of our Lord one thousand eight hundred and ninety-two.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
STEPHEN J. FIELD,
Associate Justice of the Supreme Court of the United States.

[Endorsed:] To be sent up with the record by the clerk.

202 In the Supreme Court of the United States.

JOHN KEANE, Appellant,
v.
ANNA SOPHIA BRYGGER, Executrix, and OLE SCHILLESTEAD, Executor, of the Estate of Johan Brygger, Deceased, Appellees. } Bond.

Know all men by these presents that we, John Keane and Patriek C. Hayes and John Dowling, of the county of King and State of Washington, are held and firmly bound unto the above Anna

Sophia Brygger, executrix, and Ole Schillestead, executor, of the estate of Johan Brygger, deceased, in the sum of five thousand dollars ($5,000.00), to be paid to said Anna Sophia Brygger, executrix, and Ole Schillestead, executor, of the estate of Johan Brygger, deceased; for the payment of which, well and truly to be made, we bind ourselves and each of us, and our and each of our executors, heirs, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 28th day of January, 1892.

Whereas the above-named John Keane has prosecuted a writ of error from the Supreme Court of the United States to the supreme court of the State of Washington to reverse the decree rendered in the above-entitled suit by the supreme court of the State of Washington and the superior court of King county, Washington:

Now, therefore, the condition of this obligation is such that if the above-named John Keane shall prosecute said writ of error to effect and answer all damages and costs if he fail to make said writ
203 of error good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

JOHN KEANE.
PATRICK C. HAYES.
JOHN DOWLING.

STATE OF WASHINGTON, } ss:
County of King, }

This is to certify that on this 28th day of January, 1892, before me, the undersigned, a notary public in and for the State of Washington, duly commissioned and sworn, personally appeared John Keane and Patrick C. Hayes and John Dowling, to me known to be the individuals described in and who executed the above bond and obligation, and acknowledged to me that they signed and sealed the same as their free and voluntary act and deed for the uses and purposes therein mentioned.

Witness my hand and official seal the day and year in this certificate first above written.

FRANK P. LEWIS,
Notary Public in and for the State of Washington,
[NOTARIAL SEAL.] *Residing at Seattle.*

STATE OF WASHINGTON, } ss:
County of King, }

We, Patrick C. Hayes and John Dowling, being duly sworn, on oath say that we are each worth the sum of five thousand dollars ($5,000.00) in property in the State of Washington over and
204 above all debts and liabilities and property exempt from sale on execution.

JOHN KEANE.
PATRICK C. HAYES.
JOHN DOWLING.

Subscribed and sworn to before me this 29th day of January, 1892.

FRANK P. LEWIS,
Notary Public in and for the State of Washington,
Residing at Seattle.
[NOTARIAL SEAL.]

Approved.

STEPHEN J. FIELD,
Associate Justice of the Supreme Court of the United States.

Feb'y 11th, 1892.

205 In the Supreme Court, State of Washington.

JOHN KEANE, Appellant,
v.
ANNA SOPHIA BRYGGER, Respondent.

STATE OF WASHINGTON, }
County of Thurston, } *ss:*

I, C. S. Reinhart, clerk of the supreme court of the State of Washington, hereby certify that the above and foregoing is a full, true, and correct copy of so much of the record in the above-entitled cause as has been demanded of me by the plaintiff in error herein, and in conformity to the writ of error hereto attached I now here return the same to the Supreme Court of the United States, together with the original writ of error, the original citation, and a copy of the bond in said cause.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Olympia, Washington, this 5th day of March, 1892.

[Seal of the Supreme Court, State of Washington.]

C. S. REINHART,
Clerk of the Supreme Court of the State of Washington.

Endorsed on cover: Case No. 14,992. Washington, supreme court. Term No., 94. John Keane, plaintiff in error, *vs.* Anna Sophia Brygger, executrix, and Ole Schillestead, executor, of the estate of Johan Brygger, deceased. Filed March 17, 1892.

94

FILED.
SEP 27 1895
JAMES H. McKENNEY,
CLERK.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1895.

JOHN KEANE,
PLAINTIFF IN ERROR,

VS.

ANNA SOPHIA BRYGGER,
EXECUTRIX, AND
OLE SCHILLESTAD, EXECUTOR OF THE ESTATE OF JOHAN BRYGGER, DECEASED,
DEFENDANTS IN ERROR.

In Error to the Supreme Court of the State of Washington.

Motion to Dismiss, with which is joined a Motion to Affirm under Rule 6.

CHARLES K. JENNER AND
LOUIS HENRY LEGG,
Counsel for Defendants in Error.

14,992.

14,992.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1895.

JOHN KEANE,

PLAINTIFF IN ERROR,

VS.

ANNA SOPHIA BRYGGER, EXECUTRIX, AND OLE SCHILLESTAD, EXECUTOR OF THE ESTATE OF JOHAN BRYGGER, DECEASED,

DEFENDANTS IN ERROR.

In Error to the Supreme Court of the State of Washington.

Motion to Dismiss, with which is joined a Motion to Affirm under Rule 6.

Now come the above named defendants in error, Anna Sophia Brygger, executrix, and Ole Schillestad, executor, and move the said Court :

1. To dismiss the writ of error in this cause for want of jurisdiction, because the record presents no question of a federal character, such as will give this Court jurisdiction to review the judgment complained of.

2 Or, if the writ of error shall not be dismissed, that the judgment of the Supreme Court of the State of Washington, to which said writ of error was directed, be affirmed with costs, on the ground that, although in the opinion of this Court the record may show that this Court has jurisdiction, yet it is manifest that the writ of error was taken for delay only, that the question or questions upon which the jurisdiction depends have been so often decided by this Court that the issues presented no longer constitute a federal question, and for the further reason that the record in this cause shows no assignment or specifications of error.

This motion is made under Rule 6, and for reasons more fully stated in the accompanying brief.

CHARLES K. JENNER AND
LOUIS HENRY LEGG,
Counsel for Defendants in Error.

NOTICE TO PLAINTIFF IN ERROR :

To Johne Kean and to his attorneys : You, and each of you, will please take notice that on Monday, the 21st day of October, A. D. 1895, the motions, of which the foregoing are copies, will be submitted at the opening of Court to the Supreme Court of the United States for the decision of the Court thereon.

Annexed hereto is a copy of the brief in support of said motions.

CHARLES K. JENNER AND
LOUIS HENRY LEGG,
Counsel for Defendants in Error.

STATEMENT OF THE CASE.

This is an action at law and was brought by the defendants in error against the plaintiff in error in the District Court of the Third Judicial District of Washington Territory, holding terms at the city of Seattle, county of King, in said Territory, to recover possession from said plaintiff in error the South West Quarter of the North West Quarter of Section Eleven, Township Twenty-five, North of Range Three East, in said county and Territory, and for an order of said Court restraining said plaintiff in error, his servants or agents from doing certain acts in and upon said lands

See Complaint, pages 1 and 2, Record.

The restraining order was granted by said Court, and said plaintiff in error ordered to show cause.

Page 3, Record.

Said plaintiff in error thereafter appeared and filed answer and counter claim. The answer denied title in defendants in error, and as a counter claim and separate defense, plaintiff in error alleged his qualifications as a Homestead claimant, and that he had filed upon the same as a Homestead claim on the 20th day of October, A. D. 1888, and that said tract of land was upon said date unappropriated public lands of the United States.

Pages 5 to 9 inclusive, Record.

Thereafter, defendants in error replied to said answer and counter claim, putting in issue matters therein set forth,

Pages 9 and 10, Record.

During the pendancy of said action the Territory of Washington was admitted to the Union as a State, and said action came on for trial upon the 18th day of June, 1890, in the Superior Court of King county, State of Washington.

Page 12, Record.

After the hearing of the testimony and the argument of respective counsel, the Court found that said tract of land was selected by the Territory of Washington, through its University Commissioners, on the 10th day of March, A. D. 1864, as University lands, and that said University Commissioners did, upon said date, execute and deliver to one John Ross a deed to the land

in controversy for the consideration of two hundred and forty dollars, paid by said John Ross to said University Commissioners; that on the 4th day of April, A. D. 1876, said John Ross duly sold and conveyed said lands by deed to John Brygger, the testator herein, and that both said deeds were duly recorded; that prior to the year 1864 one Lemuel Holgate had filed a Homestead filing on the land in controversy, but that he had duly relinquished his right, title and interest in and to the same in the month of February, 1864; that said University Commissioners filed a list of such selections in the local Land Office in said Territory, which said list was known and recognized in the Land Department of the Government as list number two, and that the same was filed in the proper local Land Office in March, 1867, and that in said list said land was located and selected for University purposes; that on the 22d day of April, A. D. 1889, the Honorable John R. Noble, Secretary of the Interior, issued his certificate under the Act of Congress approved March 14th, 1864, after due proof, including the land in controversy, and approving the same as a grant in fee simple to the said Territory and to its vendees, under and by virtue of said Act; that on or about October 20th, A. D. 1888, said plaintiff in error entered his Homestead filing in the Land Office at Seattle, on the land in controversy, and that in February, 1889, he took up his residence on a portion of said land and erected a building on the same; that prior to the erection of said building said defendants in error notified said plaintiff in error of their rights, claims and title to said land.

Pages 18, 19 and 20, Record.

Judgment was entered in favor of the defendants in error, decreeing to them the possession of said lands, and making the injunction theretofore issued perpetual.

Page 23, Record.

Plaintiff in error thereupon appealed to the Supreme Court of the State of Washington, which Court, on the 16th day of December, A. D. 1891, affirmed the judgment of the lower Court.

Pages 115 to 123 inclusive, Record.

Thereupon plaintiff in error sued out his writ of error, bringing the matter before this Court.

MOTION TO DISMISS FOR WANT OF JURISDICTION.

Defendants in error allege: That there is no Federal question in this case, such as will give this Court jurisdiction under the provisions of Section 709 of the Revised Statutes of the United States.

The record shows that defendants in error claim title to the land in question, deriving the same from the government of the United States. Said title was evidenced by approved list number 14, by John W. Noble, Secretary of the Interior, and certified to by S. M. Stockslager, Commissioner of the General Land Office.

Pages 91 and 92, Record.

The legal effect of this list, under said Act of March 14th, 1864, is the conveyance of the legal title to said tract from the government of the United States to the Territory of Washington, and through it to its vendees.

Said Act of March 14th, 1864, constituted the Secretary of the Interior a special tribunal with sole jurisdiction and authority to pass upon certain questions of fact, among which is the question whether the tract of land had been selected, prior to the passage of said Act, by the properly constituted authorities of the Territory; whether, prior to said date, a sale had been made to individuals of said land by the Territorial authorities; whether such sale was *bona fide* and of the class in said Act mentioned; whether such selection were, in all other respects, regular and proper. It is thoroughly well established that the decision of a specially constitued tribunal, upon matters coming properly within the scope of the Act, is not reviewable by any other Court or tribunal.

Johnson vs. Towsley, 80 U. S., p. 91.

Steel vs. Smelting Co., 106 U. S., p. 447.

Vance vs. Burbank, 101 U. S., p. 514.

French vs. Fyan, 93 U. S., p. 169.

The Courts of the State, in the case at bar, did, however, consider all the facts in relation to said tract, from a time previous to its selection in 1864, and affirmed the regularity and legality of each act of the Territorial authorities, the Land Deparment, and the private individuals connected therewith.

See findings and decision of Supreme Court of State, *supra.*

The contention of plaintiff in error was, that the selection by the University Commissioners of said tract of land was irregular and void, because of an alleged Homestead claim upon said land prior to date of selection, and uncancelled at the date of selection. These questions were in the exclusive jurisdiction of the Land Department of the United States, and especially of the Secretary of the Interior, and when found by the Secretary of the Interior adversely to said contention, such finding established said facts, and, in the absence of fraud, which is not alleged in this case, said facts cannot be called in question by anyone, nor can the conclusions, as evidenced by said certified list, made and issued under said act of March 14th, 1864, be called in question; therefore no question was ever legally presented in this cause in regard to said facts, and the same present no Federal question for the consideration of this Court.

Cases cited, supra.

Plaintiff in error claims, also, a right to said tract of land by virtue of a Homestead filing made by him upon the same in the month of October, 1888, but no Federal question can be claimed by reason of the same, because the record shows that said Homestead claim was received by the local Land Office by a mere inadvertance, and that the same was corrected by the cancellation thereof as soon as the true state of the record was discovered.

Page 122, bottom, Record.

The fact that a party has entered upon a tract of land patented by the government to another party, and has offered a filing therefore under the Homestead laws of the United States, does not raise a Federal question, such as to give this Court jurisdiction, unless there is some reason to believe that such apparent legal title transferred by the patent from the United States was wrongfully conveyed, and that the real title is still in the government.

Hamblin vs. Western Land Company, 147 U. S., 530.

No Federal question is presented by the action of the Land Department of the United States in cancelling a filing from the records thereof, where such cancellation is not shown to have been the result of fraud.

Lee vs. Johnson, 116 U. S., p. 570.

Knight vs. Land Asso., 142 U. S., 181.

Defendants in error claim title to said tract under a grant by the United States; the decision of the State Supreme Court was in favor of the grant; therefore, under Section 709 of the Revised Statutes, no Federal question is presented in the record.

We do not consider it necessary to urge upon this Court any of the other questions passed upon by the Supreme Court of the State of Washington, as it is manifest from the record that all such other questions do not present any Federal question, but are exclusively within the jurisdiction of our State law.

MOTION TO AFFIRM JUDGMENT.

If the Court should be satisfied that a Federal question is presented in this case, the motion should be granted to affirm the judgment of the State Court, if it appears from the record that the writ of error was taken for delay only, or if it should appear to this Court that the judgement of the State Court is so clearly right that it is not necessary to hear further argument, or in the event the plaintiff in error has filed no assignment or specifications of error.

The questions presented for the consideration of the Court, if said record presents any such questions, are so well settled by a long line of decisions of this Court, that every such question is, and must be, held as established law, adversely to the contention of the plaintiff in error.

Carey vs. Houston, 128 U. S., 578.

Section 997 of the Revised Statues of the United States requires an assignment of error in the record.

See also Reeve vs. Phelps, decided by this Court, Feby. 1, 1894.

We deem it unnecessary to multiply citation of authorities upon the propositions herein submitted, for they are so well established as to be beyond the realm of controversy.

We respectfully submit, first, that the motion to dismiss should be granted for want of jurisdiction; or, second, that the judgment of the State Court should be affirmed.

All of which is repectfully submitted,

CHARLES K. JENNER AND
LOUIS HENRY LEGG,
Counsel for Defendants in Error.

Supreme Court of the United States.

OCTOBER TERM, 1895.

No. 94.

JOHN KEANE, PLAINTIFF IN ERROR,

vs.

BRYGGER, ETC., EXECUTOR.

BRIEF FOR PLAINTIFF IN ERROR UPON THE MOTION TO DISMISS, ETC.

S. F. PHILLIPS,
F. D. MCKENNEY,
For Keane.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1895.

No. 94.

JOHN KEANE, PLAINTIFF IN ERROR,

vs.

BRYGGER, ETC., EXECUTOR.

BRIEF FOR PLAINTIFF IN ERROR UPON THE MOTION TO DISMISS, ETC.

This is a writ of error to the supreme court of the State of Washington upon a judgment in favor of Brygger, etc., who had sued Keane to recover certain land to which in the complaint they alleged title under the will of one *John Brygger*, as its alleged owner in fee in November, 1888. (Record, pp. 1 and 2.)

Keane's *answer* denied the validity of *John Brygger's* title, etc.; and also made an *equitable counter-claim* (p. 8) to the effect that upon the 20th of October, 1888, he (Keane) had made a homestead entry upon the land in question, it being then unappropriated public land, and that he had remained in possession ever since.

The reply denied those *equitable* allegations (p. 9).

Upon the trial in the superior court of Washington (p. 12) that court found, amongst other facts, substantially the following (p. 18, etc.):

Upon the 10th of March, 1864, certain commissioners of the University of Washington Territory had conveyed the land in question to one Ross, and he, in 1876, conveyed it to *John Brygger*, who held possession until his death, in December, 1888; whereupon Brygger, etc., became entitled thereto, etc. (Findings 1, 4, and 5.)

Prior to 1864 one Holgate had made homestead entry on the land, which in February, 1864, he duly relinquished, although his entry was not canceled in the Land Department until December, 1871. (Findings 2 and 10.)

Prior to February, 1864, the commissioners aforesaid had *selected* the land, and in April, 1889, the Secretary of the Interior issued a certificate under the statute of March 14, 1864, approving of such *selection* and the subsequent *sale* to Ross as a grant. (Findings 3 and 7.)

In October, 1888, Keane made homestead filing on the land, and in February, 1889, took possession of a portion of it. (Finding 8.)

Upon these findings the superior court (p. 12) gave judgment for Brygger, etc.; and upon appeal by Keane to the supreme court of the State that judgment was affirmed (p. 124).

I.

Neglecting all matters passed upon by the supreme court of Washington, excepting such as may show a decision *adverse to some Federal authority*, etc., reasonably relied upon before it by Keane,—we submit that the main stress of this controversy turns upon the validity of Keane's homestead

entry of October, 1888, this question involving certain incidental ones of like character.

It may throw light upon the character (*i. e.*, whether *Federal* or not) of the questions in the record, to say that at the hearing we propose to assign for error,—

1. That the supreme court of the State held that Keane's homestead entry of October, 1888, was invalid,

And that incidentally thereto it held—

2. That, although Holgate's homestead entry had been made before the year 1864 and had remained *uncanceled* until 1871, yet, nevertheless, a mere relinquishment made by him in February, 1864—anterior, *i. e.*, to the passage of the act of May 14, 1880—and unaccepted, as above, was competent to restore the subject-matter of that entry to its condition anterior thereto *as a part of the public lands*.

3. That the provisions of the statute of March 14, 1864, applied to transactions of *selection* and *sale* of the sort described in the record—that is, that it validated selections of land other than "public."

The statute of March 14, 1864, will be found immediately below; and that of May 14, 1880, so far as material here, upon page 116 of the Record.

This is no place for developing these assignments, yet, inasmuch as the seriousness of the question involved in the second assignment may be exhibited in a very brief way, we beg leave to submit an important circular instruction issued by the Land Department on the 25th of May, 1880, to

guide its local officials in the practical construction of the statute passed on the 14th day of the same month, as follows:

"Appended hereto is a copy of the act approved May 14, 1880, which changes existing laws and regulations relative to entry of certain classes of lands."

"The first section provides 'that when a pre-emption, homestead, or timber-culture claimant shall file a written relinquishment of his claim in the local land office the land covered by such claim shall be held as open to settlement and entry without other action on the part of the Commissioner of the General Land Office.'"

"*This will be held to apply only to relinquishments which are filed subsequent to the date of said act, viz., May 14, 1880.*"

"You are instructed," etc. [The rest of the circular concerned other matters.] (1 Copp's Public Land Laws, page 311.)

Adverting to the connection in which Lee *vs.* Johnson and Knight *vs.* Land Asso. are cited (Brief, pp. 5–7), we reply that there is no contention here that it is competent (in regard to the homestead entry of October, 1888, or otherwise,) to question findings of fact made in the Land Department. What we question is certain *deductions of law* from findings by which we are bound. This is competent. (Nesqually *vs.* Gibbon, 158 U. S., 155, 169; Rector *vs.* Gibbon, 111 U. S., pp. 289–291.)

So also we may question the Secretary's *jurisdiction* (assignment 3, above) in any matter upon which he has made findings.

II.

Upon the motion to *affirm*, we submit what we have already said as sufficient to show that the appeal to this Court deserves to be *heard*.

Besides, the present case is "No. 94" upon the docket, and therefore upon the eve of being *heard*. The complaint, therefore, that the writ of error therein was *taken for delay only* is a singular one when it appears that we have already enjoyed substantially *all* the delay that we could at any time have hoped for; and this, too, with *the acquiescence of Bryggar, etc.* We submit in this connection that a motion to *affirm* comes unrecommended where, after great delay, its sole promise is virtually to substitute determination upon a motion for one upon a hearing at the same term.

In conclusion, the case of Rowe *vs.* Phelps, 152 U. S., 87 (cited Brief, p. 7), applies only to cases when they come before the court *at the hearing*. In other words, if at that time there is neither assignment of error in the record nor specification thereof on the brief, the case will be dismissed. In this respect that case follows strictly other reported cases. (121 U. S., 286; 123 *ib.*, 519, and 135 *ib.*, 609.)

S. F. Phillips,
F. D. McKenney,
For Keane.

160 U.S. 276

FILED.
DEC 3 1895
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1895.

160-276

JOHN KEANE, PLAINTIFF IN ERROR,

v.

ANNA SOPHIA BRYGGER ET AL.,
DEFENDANTS IN ERROR.

No. 94.

In Error to the Supreme Court of the State of Washington.

BRIEF FOR PLAINTIFF IN ERROR.

JAMES K. REDINGTON,
For Plaintiff in Error.

WASHINGTON, D. C.:
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1895.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1895.

JOHN KEANE, PLAINTIFF IN ERROR,

v.

ANNA SOPHIA BRYGGER ET AL., DEFENDANTS IN ERROR.

No. 94.

In Error to the Supreme Court of the State of Washington.

Brief for Plaintiff in Error.

The following brief is submitted by associate counsel as supplemental to that already filed by Mr. S. F. Phillips and Mr. F. D. McKenney. If it shall be found to contain anything additional to the considerations already by them submitted that circumstance is to be attributed solely to late consultations and exchange of views leading to whatever of merit herein appears.

STATEMENT.

The suit is ejectment or the equivalent action under the laws of the State of Washington. The defendants in error,

plaintiffs below, filed the usual declaration or complaint (pp. 1 to 3), to which plaintiff in error, defendant below, under section 531 (then 538) of the Code of Washington, regulating practice in said State, filed an answer and also a counter-claim (pp. 5 to 9). The answer categorically denied the allegations of the complaint and the counter-claim alleged an equitable title in the defendant. Section 531 (538) of the Washington Code is as follows:

"The plaintiff in such action shall set forth in his complaint the nature of his estate, claim or title to the property, and the defendant may set up a legal or equitable defence to plaintiff's claims; and the superior title, whether legal or equitable, shall prevail. The property shall be described with such certainty as to enable the possession thereof to be delivered if a recover be had."

To the counter-claim in equity, so as above set forth, the plaintiff replied by categorical denial (pp 9, 10).

Upon the issues thus formed, and without question whatever at any time on the part of the plaintiff as to the regularity of the defendant's pleadings, or their efficacy, if sustained by proof, or the jurisdiction of the court thereon to adjudicate any equitable title found to be in defendant, the parties proceeded to trial before the court, without a jury (pp. 12, 37); testimony was taken (pp. 37 to 115); the trial court filed its findings of fact and conclusions of law (pp. 18 to 21); upon such findings, final decree in favor of plaintiffs was passed (pp. 12, 13, 23); a petition for new trial was filed, heard, and denied (pp. 23 to 33); the defendant appealed to the supreme court of the State (pp. 34 to 36); the said last-mentioned court heard said appeal, upon the entire pleadings and testimony, filed its findings and opinion thereon (pp. 115 to 123), and by decree affirmed the decree of the court below (p. 124); petition for rehearing was filed by

defendant and denied (p. 124), and thereupon the case was brought into this court upon writ of error (pp. 125 to 128).

At the trial below plaintiffs, to show title to the premises, introduced and relied upon: (1) a certification of the premises to the State of Washington by the Secretary of the Interior, April 22, 1889, under the so-called university grant to the State (pp. 37 to 39, 91); (2) a deed purporting to be from proper official authority of the State, dated March 10, 1864, to John Ross (pp. 39, 40, 88, 89); (3) deed from said Ross to John Brygger, dated April 4, 1876 (pp. 46, 87); (4) last will of John Brygger devising the premises to plaintiffs (pp. 40, 82).

The certification of the premises in controversy to the State of Washington, above referred to, was in words and figures as follows (pp. 91, 121):

"DEPARTMENT OF THE INTERIOR,
"GENERAL LAND OFFICE, *April* 20, 1889.

"It is hereby certified that the tracts described in the foregoing list are embraced in the original list on file in this office of lands selected in the Olympia, now Seattle, land district, Washington Territory, by a duly authorized agent of said Territory, under the provisions of the above-cited acts of Congress, approved July 17, 1854, and March 14, 1864.

"It is further certified that the said tracts have been examined and compared with the township plat and tract book of this office and are found to be subject to selection and free from conflicts, and satisfactory proof having been furnished this office of the *bona fide* sale of the land by the territorial authorities, and the selections being in every respect regular, proper, and in accordance with the provisions of the above-named act of Congress of March 14, 1864, it is therefore recommended that the list, embracing 99 acres, be approved as a grant in fee-simple of the land therein described to the said Territory of Washington,

said approval being subject to any valid interfering rights which may have existed at the date of selection.

"S. M. STOCKSLAGER,
"*Commissioner.*"

"DEPARTMENT OF THE INTERIOR, *April* 22, 1889.

"The foregoing list of university selections, embracing 99 acres, is hereby approved as a grant in fee-simple of the land therein described to the Territory of Washington, said approval being subject to any valid interfering rights which may have existed at the date of selection.

"JOHN W. NOBLE,
"*Secretary.*"

Whereupon, defendant, in support of his claim, introduced evidence showing: (1) a homestead entry of the premises, with other land, by one Lemuel J. Holgate, June 26, 1863, and cancellation of the same by the Commissioner of the General Land-Office, December 20, 1871 (pp. 49, 114); (2) homestead entry of said premises by plaintiff in error, October 20, 1888 (pp. 51, 113); (3) possession by plaintiff in error from date of said entry to trial.

In rebuttal of the foregoing, by plaintiffs, it was shown (finding of Supreme Court, p. 116) that although the homestead entry of said Holgate was not cancelled until December 20, 1871, said Holgate, February 16, 1864, executed upon the back of his certificate of entry an endorsement in words and figures as follows:

"SEATTLE, KING COUNTY,
"*February* 16, 1864.

"I hereby relinquish all my right and title to the within-described land in favor of John Ross.

"LEMUEL J. HOLGATE."

It was further shown that this paper was filed in the local land office at Olympia, prior to the selection of the land by the State and the deed to Ross (pp. 66, 67).

In further rebuttal, on behalf of plaintiffs, it was shown that the homestead entry of the plaintiff in error, made October 20, 1888, was subsequently, and after the commencement of this suit, cancelled by the land department of the United States, for conflict with the university selection under which defendants in error claim (pp. 66, 78, 79, 80).

The trial court, in its findings of fact, after elsewhere therein reciting the certification of the premises to the State by the Secretary of the Interior, the deed to Ross, the conveyance by Ross to Brygger, the devise by Brygger, and the homestead entry by the plaintiff in error, found specifically as follows (pp. 19, 20):

"2*d*. We find that prior to the year A. D. 1864 one Lemuel Holgate had filed a homestead filing on the land in controversy, but that he had duly relinquished his right, title, and interest, and all of his right, title, and interest of, in, and to or growing out of said homestead filing to the United States of America in February, A. D. 1864.

"3*rd*. We further find that the University Commissioners of Washington Territory before that time selected the land in controversy, among other lands, and filed a list of such selections in the local land office in said Territory, which said list was known and recognized in the land department of the Goverment as list No. 2. We further find that said list No. 2 was filed in the proper local land office in March, A. D. 1867, and that in said list said land was located and selected, among other lands, for university purposes.

"10*th*. We further find that relinquishment of Lemuel J. Holgate was made and executed and delivered in February, 1864, but that the cancellation of said Lemuel J. Holgate's entry was not actually made on the records of the land department until December, 1871."

Upon these findings of fact the trial court found the following, among other conclusions of law (p. 20):

"1*st*. We find that there was no subsisting homestead filing of Lemuel J. Holgate on the 10th of March, A. D 1864, that being the day of the sale of the University Commissioners to John Ross, mentioned aforesaid.

"2*d*. That the certificate of the Honorable John R. Noble, Secretary of the Interior, dated April 22, and given under the act of Congress approved March 14, A. D. 1864, relates back and takes effect from the date of said sale, to wit, March 10th, A. D. 1864.

"3*rd*. We further find as a matter of law that the homestead entry filing of said defendant, John Keane, was void and of no force nor effect, absolutely invalid; that he has no right, title, or interest to said land under and by virtue of said filing."

The Supreme Court of the State of Washington, upon the appeal taken by plaintiff in error from the decree of the trial court, in its opinion (pp. 115 to 123), adopts the findings of fact made by the court below, adds thereto other facts found from the testimony, not necessary to be here recited, and adopts, in substance, the conclusions of law above quoted. The opinion proceeds upon the theory that the homestead entry of Holgate was extinguished by the relinquishment executed February 16, 1864, thus leaving the land open to the university selection, and that the certification of the lands to the State by the Secretary of the Interior is final and conclusive as the act of a special tribunal authorized by law to pass upon the rights of the State to a certification of said lands.

Subsequently to the above-recited proceedings, viz., at the present term of this court, defendants in error filed a motion to dismiss, coupled with a motion to affirm the judgment below, under Rule 6. The motion to dismiss is based upon the claim that no Federal question is involved; that to affirm upon the ground that the writ was taken for delay. These motions were postponed for consideration upon the hearing of the case upon its merits.

Specifications of Error.

1. The court below proceeded in error in holding, as matter of law, that the selection of the premises by the State was valid.

2. The court below erred in holding that the certification of said premises to the State by the Secretary of the Interior, April 22, 1889, conveyed the legal title of the United States, or was effectual, in any way, to validate the State selection, or the sale thereunder.

3. The court below erred in holding that the premises in question were not public lands at the date of the homestead entry by plaintiff in error, and that said entry was not a lawful appropriation thereof.

BRIEF.

Before proceeding to the merits of the above assignments, reference is had to the motion to dismiss or affirm, and to the position of counsel for defendants in error thereon.

Upon the motion to dismiss it is said by our adversaries that the defendants in error claim under a certificate having the force of a patent; that in making this certificate the Secretary of the Interior acted as a special tribunal; that so acting, that officer passed upon all necessary questions of fact: that in like manner the Secretary was authorized and empowered to pass upon the facts connected with the homestead claim of plaintiff in error, and that his findings in respect to all such facts are conclusive. It is said that upon these considerations no Federal question is presented.

The conclusive answer to this contention is that the question brought here for review is not one of fact but of law. The plaintiff below claimed under a certificate made

after the ascertainment of certain facts by the Secretary and adjudged by him to be sufficient in law to authorize the issue thereof. The defendant below denied that upon the facts so found the *law* entitled the State to select the land or receive a certificate therefor; that this being so such selection did not appropriate the land or segregate it from the public domain, and that hence his homestead entry, made prior to the certification, was valid. The question raised and decided below and brought here by writ of error is whether the laws of the United States were properly applied by the Secretary of the Interior to the facts found; not whether these facts were correctly ascertained.

Without disputing or questioning the facts found by the Secretary, our contention is that the law was misapplied to those facts. Such a misapplication of the law by the Secretary of the Interior has always been held reviewable by the courts. And as the solution of this question necessarily involves a consideration and construction of the statutes of the United States, the question is Federal and cognizable by this court under section 789 of the Revised Statutes of the United States.

It is further claimed, in the brief of counsel for defendants in error recently filed, that the record presents no Federal question, and that the judgment should be affirmed on the ground that section 531 (538) of the Code of Washington does not permit an equitable title to be set up in an action of ejectment against a patent of the United States. The equitable defence set up at the trial below by the plaintiff in error is denominated by counsel a collateral attack upon a legal title evidenced by patent. This, it is claimed, is not permissible, and several authorities are cited in support of this position.

It is submitted that this contention is based upon an

entire misapprehension of the status of the case. The statute of the State of Washington, quoted in full in our opening statement, specifically provides that, in actions for the recovery of real property, an equitable title in the defendant may be set up in defence, and that the superior title, whether legal or equitable, shall prevail. We submit that when legal title to public land has once passed from the United States to an individual, that title becomes subject to the laws of the State where the premises may be situated, and that all remedies in respect thereto must follow the laws of that particular State. In the case at bar the State of Washington, like many other of the younger States of the Union, has chosen to enact a law under which the distinction between common law and equitable remedies is abolished, and an equitable defence is admitted even in suits for the recovery of possession of land. The defendant, under this and similar statutes, is simply admitted, in a suit in ejectment, to set up affirmatively, as a counter-claim, the same right which originally he might, with equal efficacy, have invoked in a court of chancery or in the equity side of a court sitting in a State where courts of equity and law were combined.

The effect of the assertion of such a counter-claim under statutes of this kind is to bring the whole subject-matter before one court for final adjudication in one cause. It is not, in fact, a collateral, but a direct attack in equity against the plaintiff's legal title.

And when this is done, and a cause with issues thus made up reaches this court, jurisdiction to hear and determine the validity of the counter-claim as against that set up by the plaintiff below has never, to the knowledge of counsel, heretofore been doubted.

The authorities cited upon this point by opposing counsel (brief, page 2) have been carefully examined, and from

such examination it is submitted that none of said authorities cover the case of an equitable defence set up by way of counter-claim under a statute of a State, and that none of said cases are in any respect authority against the right of plaintiff in error upon the pending record to have in this court an adjudication of his equitable title as against the title set up by the defendants in error. Upon the contrary, it has been uniformly held that in courts where the distinction between law and equity no longer exists the defendant in ejectment is not required to resort to the equity side of the court to establish an equitable defence, but may set up such defence in his answer or by way of counter-claim. And when the plaintiff in such cases relies upon a legal title he can only recover where such legal title is paramount to the equitable title of the defendant.

Newell on Ejectment, p. 680, sec. 54; p. 681, sec. 56; p. 682, sec. 57, and cases cited.

And in any event this question cannot be now raised in the case at bar. After issues thus framed in the court below, trial thereon had, final judgment entered, and writ of error taken, all without objection or question upon this point by defendants in error, this court will not now consider the matter as involved for decision.

Adam *v.* Norris, 103 U. S. 591, 595.

Proceeding now to the merits of the case, it is respectfully submitted:

I. Whether, in this particular form of proceeding, the parties are in this court bound by the findings of fact made by the court below, or are at liberty to open the testimony to ascertain the facts, it conclusively appears that at the date when the University authorities attempted to

"select" the premises in question, viz., in 1864, and at the date when the list containing such "selection" was filed in the proper land office, viz., in March, 1867, the land was embraced within the homestead entry of one Holgate, made of record prior to 1864, and which remained at those dates, and thereafter until December, 1871, uncancelled upon the records of the Government.

Findings 2 and 10, pp. 19, 20.

II. The grants of lands under which the foregoing selection was made are found in the act of September 27, 1850, sec. 10 (9 Stat. 499), the act of July 17, 1854 (10 Stat. 305), and the act of February 22, 1889, sec. 21 (25 Stat. 682). The grant to the Territory and State by these acts is confessedly a grant in the nature of a float attaching to specific lands only by and at the date of selection. The selection proper in the case at bar was undoubtedly made in contemplation of law when the list was filed in the local office in March, 1867 (Finding No. 3). But whether considered as of that or as of an earlier date, it was confessedly after the homestead entry of Holgate above referred to and while the same remained uncancelled upon the records. No other or different selection ever appears to have been made. If such selection was valid, it was so notwithstanding the said subsisting entry by Holgate.

III. A *prima facie* valid entry of record, in the administration of the land laws of the United States by the Interior Department, has uniformly been held to operate as an appropriation of the land covered thereby, reserving it from all other disposition so long as such entry remains uncancelled upon the records of the Government.

Davis *v.* Crans, 11 C. L. O. 22;

Graham *v.* H. & D. R.R. Co., 1 L. D. 362;

Whitney *v.* Maxwell, 2 *ib.* 98;

Henry Cliff, 3 *ib.* 217;
Ernest Truent, *ib.* 228;
St. Paul M. & M. R.R. Co. *v.* Forseth, 3 *ib.* 446;
St. Paul M. & M. R.R. Co. *v.* Leech, *ib.* 506;
Simpson *v.* Foley, 4 *ib.* 21;
So. M. R.R. Co. *v.* Bottomly, *ib.* 208–210;
Hugh Barclay, *ib.* 390–392;
Legan *v.* Thomas *et al.*, *ib.* 441;
Pfaff *v.* Williams *et al.*, *ib.* 455–457;
Milton Townsite *v.* Gann, *ib.* 584–586;
Hollants *v.* Sullivan, 5 *ib.* 115;
Schrotberger *v.* Arnold, 6 *ib.* 425;
Allen *v.* Curtins, 7 *ib.* 444;
Mudgett *v.* D. & S. C. R.R. Co., 8 *ib.* 243;
James A. Forward, *ib.* 528;
Linville *v.* Clearwaters *et al.*, 11 *ib.* 356;
Leary *v.* Manuel, 12 *ib.* 345;
Ludwig May, 13 *ib.* 297;
Henry Milne, 14 *ib.* 242.

Precisely the same doctrine has been repeatedly, and without exception so far as counsel is advised, announced by the courts.

McIntire *v.* Roeschlaub, 37 Fed. Rep. 556;
Chotard *v.* Pope, 12 Wheat. 586, 588;
Bagnell *v.* Broderick, 13 Pet. 436;
Wilcox *v.* Jackson, *ib.* 498;
Johnson *v.* Towsley, 13 Wall. 73, 75;
L. L. & G. R.R. *v.* United States, 92 U. S. 733, 741;
R.R. Co. *v.* Dunmeyer, 113 U. S. 629;
Hastings *v.* Whitney, 132 U. S. 357, 361, *et seq.*

And if any doubt ever existed upon this point it must now be considered as removed by a very recent decision of this court.

Whitney *v.* Taylor, 158 U. S. 85.

It follows from these considerations that the selection by the State of the premises in dispute was of lands absolutely appropriated and reserved, and that the same was therefore entirely ineffectual in law and void.

IV. Nor can the selection be considered as continuing and as taking effect upon the cancellation of the Holgate entry. To so hold would violate every principle underlying the land system. That system, in every branch, has always been enacted by Congress, and construed by the Department and the courts, upon the theory that land once withdrawn from public disposition can only again become public by such formal proceedings as will open the same to the first legal applicant without special privilege or priority to be derived from a prior invalid application (Eldred *v.* Sexton, 19 Wall. 189). With this well-known principle in contemplation the decisions of the Land Department from the earliest day have been uniform, to the effect that a filing left in the possession of Government officers while the land was reserved from entry will not take effect, as an application or selection, upon the restoration of said lands to market, but that, upon the contrary, such lands will, upon restoration, be open to the first comer who tenders a legal application.

V. The homestead entry by plaintiff in error made October 20, 1888, the land being in the condition hereinbefore described, was a legal and valid appropriation of the same and vested in said plaintiff in error an equitable title to the land, and the right thereafter, upon complying with the provisions of law as to residence and cultivation, to receive from the United States evidence of legal title in the form of a patent. The homestead act (Revised Statutes, section 2289) permits the entry "of unappropriated public lands." The premises in question, as here-

inbefore shown, were, upon the said 20th day of October, 1888, unappropriated and hence subject to entry by the plaintiff in error. Under such entry said plaintiff in error was entitled to the privilege of complying with all the requirements of the act and thereby earning full legal title.

VI. The cancellation by the land department of the homestead entry of the plaintiff in error, made as aforesaid, proceeded in error of law and was and is ineffectual to deprive him of any legal or equitable rights vested by virtue of his entry. The cancellation proceeded upon the theory that the relinquishment executed by Holgate upon the back of his homestead certificate was an extinguishment of his homestead right without reference to the cancellation of the same upon the records of the Government.

Action of the department, Record, pp. 78 to 80.
Opinion of Supreme Court, Record, p. 119.

This was error of law, as already pointed out. The relinquishment, under all the authorities cited, was ineffectual to restore the land to the public domain prior to the notation thereof upon the records of the Government and the formal cancellation of the entry. Such cancellation therefore did not operate to divest the plaintiff in error of the rights and equities obtained under his entry, and such rights and equities are now entitled to the protection of this court.

VII. That the so-called relinquishment by Holgate was ineffectual, without the assent and acceptance of the United States, to restore the land to the public domain, is fully shown in the brief for plaintiff in error heretofore filed by reference to—

Act of May 14, 1880, 21 Stat. 140.
Circular General Land Office, May 25, 1880.

VIII. The certification of the land by the Secretary of the Interior gave no additional validity to the selection for the following reasons:

(*a*) The entire proceeding, as hereinbefore shown, was based upon an error of law in the assumption that the relinquishment executed by Holgate operated to restore the land to the public domain.

(*b*) The act of August 3, 1854 (10 Stat. 346), being the only act of Congress defining the force and effect of such certificates, is as follows:

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That in all cases where lands have been or shall hereafter be granted by any law of Congress to any one of the several States and Territories, and where said law does not convey the fee-simple title of such lands or require patents to be issued therefor, the lists of such lands which have been or may hereafter be certified by the Commissioner of the General Land Office, under the seal of said office, either as originals or copies of the originals or records, shall be regarded as conveying the fee simple of all the lands embraced in such lists that are of the character contemplated by such act of Congress and intended to be granted thereby; but where lands embraced in said lists are not of the character embraced by such acts of Congress and are not intended to be granted thereby, said lists, so far as these lands are concerned, shall be perfectly null and void, and no right, title, claim, or interest shall be conveyed thereby."

Under the express terms of this statute the Secretary of the Interior was without authority to issue a certificate in the case at bar, and such certificate, in the language of the act, is perfectly null and void, and conveys no right, title, claim, or interest.

The land in controversy, being appropriated and reserved at the date of selection, was not of the character

contemplated by the granting statute and was not intended to be granted thereby. It was hence within the prohibition of the act of 1854 against certification. Having been included within a certificate, by error of law, that certificate is, as to such land, absolutely null and void.

IX. The act of Congress of March 14, 1864 (13 Stat. 28), cited by counsel for plaintiff in error as validating the claim of the State, has no application because:

(*a*) The act upon its face does not apply to defects in title of the kind here apparent. Its sole purpose was to validate sales illegal because made of lands not then granted but only reserved.

(*b*) It expressly excepts from confirmation selections which are not, with reference to the above-mentioned defect, "*in all other respects* regular and proper." This selection was not in all other respects regular and proper, but was invalid for the reasons stated.

(*c*) Under this act, as under all others, the certification proceeded contrary to law and was hence invalid.

X. The eighth finding of fact (p. 20) recites that on or about October 20, 1888, the plaintiff in error entered the land in controversy as a homestead; that in February, 1889, he took up his residence upon a portion of said land; that he did some clearing and removed a portion of a fence in order to get into the premises, and that he erected a building thereon within said fencing. There is no finding that the tract was wholly enclosed or that the entry therein by plaintiff in error was accompanied by any force or violence.

Although no claim against the validity of the homestead entry of plaintiff in error is made by adverse counsel, in respect of the facts above found, it is considered proper, in view of the decision of this court in Atherton *v.* Fowler (96 U. S. 513), to submit the following suggestions:

(*a*) The doctrine of Atherton *v.* Fowler, as explained in Beck *v.* Mergher (104 U. S. 279, 287), is limited to cases of *forcible* intrusion; not mere peaceable entry into an inclosure.

(*b*) In the case at bar there is no finding of a complete enclosure and, we may add, no testimony to that effect.

(*c*) The plaintiff in error entered into possession not as a trespasser but under color of authority from the United States shown by his homestead entry.

(*d*) The case at bar, upon all of these considerations, is to be distinguished from that of Atherton *v.* Fowler, and is not subject to any criticism therein expressed.

Upon the whole case it is submitted that the decree below should be reversed and the cause remanded with directions to enter a degree for plaintiff in error upon the counter-defence pleaded.

Respectfully submitted.

JAMES K. REDINGTON,
for Plaintiff in Error.

FILED.
DEC 2 1895
JAMES H. McKENNEY,
CLERK

Supreme Court of the United States.

OCTOBER TERM, 1895.

No. 94.

JOHN KEANE, PLAINTIFF IN ERROR,

vs.

ANNA S. BRYGGER ET AL.

BRIEF FOR PLAINTIFF IN ERROR

S. F. PHILLIPS,
FREDERIC D. McKENNEY,
For the Plaintiff in Error.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1895.

No. 94.

JOHN KEANE, PLAINTIFF IN ERROR,

vs.

ANNA S. BRYGGER ET AL.

BRIEF FOR PLAINTIFF IN ERROR.

This was an action for the possession of a tract of land—S. W. ¼ N. W. ¼, section 11, &c.—in the State of Washington, the complaint in which was filed February 15, 1889. (Record, p. 3.)

Amongst other defenses, Keane made an equitable counter-claim to the effect that on the 20th of October, 1888, the land in question, being then unappropriated public land, had been entered by him as a homestead; and that said entry had ever since remained valid, six months not having elapsed since it was made (p. 7).

To this the plaintiff replied by a denial.

The findings of fact and conclusions of law, in the trial court, are upon pages 18 to 21.

Upon the whole matter, the superior court adjudged, (p. 23,) that the plaintiffs recover the premises; and upon appeal to the Supreme Court of the State the findings, conclusions, and judgment below were affirmed (p. 123).

The facts found, so far as material in this Court, are substantially as follows (pp. 18, &c.):

The 40 acres in question had been public land, and the first appropriation thereof was by one Holgate, who before the year 1864 had filed upon the quarter section which included it for a homestead. This entry was relinquished by him in February, 1864, but was not canceled until December, 1871. Findings, 2 to 10.

Before February, 1864, the University Commissioners of Washington selected this land, and they filed a *list* thereof in March, 1867. Finding, 3.

Upon the 10th of March, 1864, these commissioners conveyed the land to John Ross, in consideration of $240. And upon the 4th of April, 1876, Ross sold it to John Brygger, testator of the plaintiffs in the action. Brygger took possession about April, 1876, and remained there until his death, in December, 1888;—improving the land by cultivation, planting trees, the erection of outhouses, and making fences "around the entire tract, with the exception of a small portion;" as well also by building a dwelling-house, the larger part of which was upon an adjoining piece of land owned by him,—that house being his dwelling up to the time of his death. After his death the premises continued in the actual possession of the plaintiffs up to the time of their ouster by the defendant. Findings, 4, 5 and 6.

On the 22d of April, 1889, the Secretary of the Interior

issued a certificate, under the act of March 14, 1864, approving the proceedings betwixt the Land Department, the commissioners, and their vendees as a grant in fee-simple. Finding, 7.

On or about October 20, 1888, the plaintiff in error made homestead entry on the land; and in February, 1889, he took up residence thereupon,—removing a portion of Brygger's fence for that purpose, &c. Finding, 8.

The only question that can be raised here upon the judgment below is whether it is in any respect adverse to some Federal authority reasonably relied upon before the court below by the plaintiff in error.

Accordingly we assign for error, the judgment,—

1. That the homestead entry of the plaintiff in error was invalid. 3d conclusion, p. 20.

2. That the selection of the premises in question by the University Commissioners in March, 1864, was valid (4th do.); and,—

3. That the certificate of the Secretary of the Interior upon the 22d of April, 1889, was effective to validate that selection, and the sale thereunder. 2d do.

These assignments may be argued together, inasmuch as they are all incidental to the question of the validity of the homestead entry therein mentioned.

The contention of the plaintiff in error is that the tract in question was segregated from the public lands by the entry of Holgate in 1863 or before, and that it remained so until December, 1871,—the date at which the offer by Holgate to relinquish, tendered in February, 1864, was accepted by the United States, and the entry canceled. As a consequence of this the selection by the University Commissioners in March, 1864, together with the list filed thereupon and the subsequent sales to Ross and the plaintiffs, were equally invalid: so that the only effective segregation of the land, other than that of Holgate, (which came to an end in December, 1871,) was that of Keane in October, 1888.

Connected with the above is the contention that the act of March 14, 1864, (13 Stats., 28), did not apply to defects *of the sort* which existed in the selection of the university lands in question.

We submit that inasmuch as in 1864 a homestead could not be initiated but by *entry*, whilst for the validity of such entry it was necessary that it should be allowed by authority of the United States,—so also for the restoration of such lands to their former "public" condition by the method of relinquishment, it was necessary that the latter should be not only *tendered* but also *accepted*, and the entry *canceled*.

This state of the law continued until the passage of the act of May 14, 1880 (21 Stats., 140).

The provisions of that act material here, as well as the contemporaneous construction given to them by the Land Office, may be seen by the following circular, issued a few days subsequent to its passage (see Copp's Land Owner, vol. 7, p. 52):

"RELINQUISHMENTS AND CONTESTS UNDER ACT OF MAY 14, 1880.

"DEPARTMENT OF THE INTERIOR,

"GENERAL LAND OFFICE,

"WASHINGTON, D. C., *May* 25, 1880.

"To District land officers.

"GENTLEMEN: Appended hereto is a copy of the act approved May 14, 1880, which changes existing laws and regulations relative to the entry of certain classes of lands.

"The first section provides, 'That when a pre-emption, homestead, or timber-culture claimant shall file a written relinquishment of his claim in the local land office, the land covered by such claim shall be held as open to settlement and entry, without further action on the part of the Commissioner of the General Land Office.' [21 Stat., 140.]

"This will be held to apply only to relinquishments which are filed subsequent to date of said act, viz: May 14, 1880.

[The remainder of the circular applies to other matters not here relevant.]

"(Signed) C. W. HOLCOMB,
"*Acting Commissioner.*"

The above official communication shows what had been the law, and its practical administration, in the matter of relinquishments up to the date of the passage of the statute of 1880, *and as well also, that as to all such previous relinquishments that law was to be observed in the future.*

In March, 1864, therefore, a mere relinquishment of a homestead entry, unattended by its acceptance, and cancellation of such entry, was ineffectual to restore the land to

its previous condition as *public lands*. And in this connection it is also to be observed that while it may have been a general duty of the register and receiver to forward such relinquishment to the Commissioner for acceptance, it was equally *and particularly* a duty of persons who should make themselves interested in such restoration to see that the relinquishment was perfected. The latter are *quasi*-petitioners to the United States for the lands, and as *actors* it is they and (*as is the case in general*) not the United States, or indeed the general public, that are affected by official *laches* thereabouts. They had made it their interest and business to see that the land was released from segregation, and therefore must themselves abide the consequences of failure,—however true it may be that some public officer has *also* become liable to punishment thereabouts.

But it is argued on behalf of the defendants in error that the defect in question is cured by the Act of March 14, 1864 (13 Stat., 28), passed four days after the selection in question—which we quote from the opinion of the learned Court below (p. 119):

"Whereas, it is declared in the fourth section of the act of Congress approved July 17th, 1854, amendatory of the act approved September twenty-seventh, eighteen hundred and fifty, creating the office of surveyor general of public lands in Oregon, etc., 'that in lieu of the two townships of land granted to the Territory of Oregon, by the tenth section of the act of eighteen hundred and fifty, for universities, there shall be reserved to each of the Territories of Washington and Oregon, two townships of land of thirty-six sections each, to be selected in legal subdivisions, for university purposes, under the direction of the legislature of said Territories, respectively;' and

"Whereas, it is represented that sales have been made by territorial authorities of lands selected in virtue of said act of seventeenth July, eighteen hundred and fifty-four, authorizing selections to be 'reserved,' merely, under the con-

viction that they had the power to dispose of the same as a fee-simple grant:

"Therefore be it enacted, etc., That in all cases of sales made to individuals by the territorial authorities prior to the passage of this act, in which it may be shown to the satisfaction of the Secretary of the Interior that such sales were *bona fide* and of the class hereinbefore mentioned, and that the tracts so sold are selections in all other respects regular and proper, it shall and may be lawful for the said Secretary to approve such selection as a grant in fee-simple, and a transcript, certified under the seal of the General Land Office by the Commissioner thereof, of such approval, shall vest the title in the Territory, and in its *bona fide* vendees."

But, upon the reason of the thing, and also by the familiar rule that general expressions in the body of a statute are to be restrained by the preamble, where the latter contains the "subject-matter" legislated upon,—we submit that the above act was not intended to, and does not apply to faults of the sort here in question. The object of the act was to cure defects arising out of the circumstance that parties who had dealt thereunder had involved themselves in trouble by not observing that the statute of *1874* had changed the word "*granted*," in the statute of *1870*, to "reserved;" and the relief given was to accept that practical construction as being correct. But a selection of *segregated* lands would have been as invalid if such selection had been intended to result in a *grant* as it would have been for an intended *reservation*. It is familiar that general words making statutory grants of land do not affect land that has been and remains *segregated*.

We submit therefore that the above statute of 1864 has no bearing upon the matter in question; and consequently that the action of the Secretary in that connection (finding 7) was *coram non judice*, and without effect.

The plaintiff in error accordingly submits the above observations in support of his last two assignments of error.

It remains to consider the question of the validity of the homestead entry by the plaintiff in error—October 20, 1888.

A preliminary remark is that this is not a case of mere *application* to enter (as in Hamblin's case, 147 U. S., 331,) but of an application *allowed*.

The findings and conclusions in the record base the judgment of invalidity solely upon the circumstances which attended its *initiation*—viz., that in order to take his earliest continuous possession the entryman, about October 20, 1888, passed within an enclosure made by the testator of the defendants in error, who was then and there also in possession.

The noted case of Atherton *vs.* Fowler, 96 U. S., 513, in which the principle relied upon for this objection was perhaps first enunciated, is thus explained in Belk *vs.* Meagher, 104 U. S., 279, 287:

"In that case it was held that a right of pre-emption could not be established by a *forcible* intrusion [notice, not mere *intrusion*, but '*forcible intrusion*'] upon the possession of one who had already settled upon, improved, and enclosed the property. Upon that proposition the Court was unanimous. We also all agreed that if a peaceable entry had been made on lands which had not been inclosed or improved, a good right might have been secured. The only difference of opinion was as to whether the entry in that case was by force or peaceable."

In other words, there were in Atherton *vs.* Fowler circumstances which in the judgment of the majority showed force as well as *intrusion* with regard to an *enclosure;* and the decision turned upon these, and not upon the bare fact of an *enclosure*—a fact which if a conclusive test would have commended itself to a court as being so easy of proof.

A reasonable variation of the above rule is given in Mower *vs.* Fletcher, 116 U. S., 380, 385, where, speaking of a person who holds under a certified school selection and list, it is said that "no one by forcibly *or surreptitiously* getting into possession can make a pre-emption settlement which will defeat his title."

That titles to property cannot be allowed to originate in force or fraud is an old and approved head of law. There may be cases in which the rule in question is expressed in freer language than the above, but upon consideration it may be thought that it is enough to protect persons who deal loosely with the very liberal public land laws of the United States against force and against fraud; and for the rest leave *vigilantes* and *dormientes* to the "pursuit of happiness" as understood by each. Prudent proprietorship as to so vast an interest as the public lands may well justify comity towards citizens whose private interest induces them to look into and to bring before the proper authorities instances of disregard of land law. In this connection it may be recollected that the Land Department systematically holds out prizes to parties who successfully contest irregular entries.

Without pursuing this topic further, it is submitted that finding 8, which alone deals with that point, charges neither *force* nor *fraud* against the plaintiff in error in respect to the initiation of his entry.

S. F. Phillips,
Frederic D. McKenney,
For the Plaintiff in Error.

60 US 216

160-276

NOV 29 1895

—IN THE—

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1895.

No. 94.

JOHN KEANE,
Plaintiff in Error,

vs.

ANNA SOPHIA BRYGGER, EXECUTRIX,

AND

OLE SCHILLESTAD, EXECUTOR OF THE ESTATE OF JOHAN BRYGGER, DECEASED,
Defendants in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

CHARLES K. JENNER, AND
LOUIS HENRY LEGG,
Counsel for Defendants in Error.

414,992

—IN THE—

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1895.

No. 94.

JOHN KEANE,
Plaintiff in Error,

vs.

ANNA SOPHIA BRYGGER, EXECUTRIX,
AND
OLE SCHILLESTAD, EXECUTOR OF THE ESTATE OF JOHAN BRYGGER, DECEASED,
Defendants in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

Before proceeding to the merits, we desire to present some additional authorities in support of our motion to dismiss or affirm.

I.

Said motion should be granted for the reason that Record pages 18, 19 and 20 show that the plaintiff in error never had a homestead entry, by reason of the fact that the land had been previously selected for university purposes, and at the time of attempted entry was not subject to homestead rights.

A denial of the existence of an entry is not the denial of a right claimed by reason of an entry.

California Powder Works vs. Davis, 151 U. S. 389.

II.

We further contend, that, as this is an action of ejectment, the legal title must prevail even against an equitable title in courts where an equitable defense is permissible, where the equities claimed would impeach the validity of a United States patent.

The certified list of secretary shown on pages 91 and 92 of Record is the title under which defendants in error claim. Plaintiff in error attacks the regularity of its issuance and attemps to set up an equitable title in himself by virtue of a homestead entry. (See Record, p. 8.)

It has been so often decided by this court that in actions of ejectment the legal title must prevail and that the patentees' title under a United States patent cannot be collaterally attacked and subjected to trial by jury; that this Record presents no federal question, and the judgment should be affirmed.

Steel vs. St. Louis Smelting & Refining Co., 106 U. S. 447.

United States vs. Flint, 4 Sawyer, 42–47.

United States vs. Throckmorton, 98 U. S. 61.

Vance vs. Burbank, 101 U. S. 514.

Redfield vs. Park, 134 U. S. 239–252.

Bagnell et al. vs. Broderick, 13 Peters, 436.

No State has the power to provide by statute that in an action of ejectment an equitable title shall prevail as against a United States patent.

The defendants not waiving their motion heretofore filed herein to dismiss or affirm, submit the following brief upon the merits.

STATEMENT OF THE CASE.

Prior to the year 1864 Lemuel J. Holgate filed a homestead on the southwest quarter of the northwest quarter of section 11 in township 25 north, range 3 east, W. M., in Washington Territory. (See Record, p. 19). That in the month of February, 1864, he relinquished all his interest in said land to the government of the United States, which said relinquishment was executed and delivered but not noted on records of Land Department until December, 1871. (See Record, pp, 19 and 20, 2d and 10th findings of fact); that on the 10th day of March, 1864, the Territory of Washington, through its university commissioners, having theretofore selected said lands for university purposes under the provisions of the Act of Congress of July 17th, 1854, sold said lands for a valuable consideration to John Ross. (See Record, p. 18. See also p. 91); that subsequently by mesne conveyances the defendants in error succeeded to the interest of John Ross in said lands. (See Record, p. 19); that on the 22d day of April, 1889, the Secretary of Interior issued his certificate under the Act of Congress, approved March 14th, 1864, after due proof covering the land in controversy and approving the same as a grant in fee simple to said Territory of Washington and its vendees. (See Record, pp. 19 and 20. See p. 91).

That on the 20th day of October, 1888, John Keane entered his homestead filing for said land in the land office and took up his residence thereon in February, 1889, being at that time a citizen of the United States and competent to make a homestead entry; that said homestead entry of Keane was reported for cancellation on November 5th, 1888, and subsequently cancelled. (See Record, pp. 20, 78).

Defendants in error brought action of ejectment and from a

decision by the Supreme Court of the State of Washington in their favor as plaintiffs, the case is brought to this court by writ of error.

I.

The findings of fact, pages 18, 19 and 20 of Record and 115, 116, 117, 118, 119 and 120 of Record are conclusive upon this court in the determination of this case upon writ of error, this being an action at law.

Dower et al. vs. Richards et al., 151 U. S. 658.

Parks vs. Turner, 53 U. S. 39–43.

Arthurs vs. Hart, 58 U. S. 6–12.

Jeffries vs. Mutual Life Ins. Co., 110 U. S. 305–309.

Nor does the fact that plaintiff in error attempts to set up an equitable defense, change the form of the action or give this court jurisdiction to examine upon writ of error anything but the law.

Brown vs. Rank, 132 U. S. 216.

II.

The facts as found show the issuance by the secretary on April 22d, 1889, under Act of Congress of March 14th, 1864, of his certified list covering the land in controversy, conveying said land in fee simple to vendees of the Territory of Washington and the right of defendants in error to maintain an action of ejectment.

III.

The plaintiff in error contends that in this action of ejectment, he, having set up a so-called equitable defense, can try the question as to whether said lands were subject to selection for university purposes, the regularity of the selection by the

university commissioners and the proceedings prior to the issuance of the certificate by the secretary of April 22d, 1889, conveying the title in fee simple to the Territory of Washington and its vendees. (Record, pp. 114, 120). If this contention is bad, the judgment must be affirmed.

We maintain that such contention is not good for the following reasons:

First. By the act of March 14, 1864, United States Statutes at Large, volume 13, page 28, it is provided: "Whereas, it is declared in the fourth section of the act of Congress, approved July 17, 1854, amendatory of the act approved September 27, 1850, creating the office of surveyor-general of the public lands in Oregon," etc., "that in lieu of the two townships of land granted to the Territory of Oregon, by the tenth section of the act of 1850, for universities, there shall be reserved to each of the Territories of Washington and Oregon, two townships of land of thirty-six sections each, to be selected in legal subdivisions, for university purposes, under the direction of the legislatures of said Territories, respectively; and, whereas, it is represented that sales have been made by Territorial authorities of lands selected in virtue of the terms of said act of 17th July, 1854, authorizing selections to be 'reserved,' merely, under the conviction that they had the power to dispose of the same as a fee-simple grant:

"Therefore, be it enacted, etc., That in all cases of sales made to individuals by the Territorial authorities prior to the passage of this act, in which it may be shown to the satisfaction of the Secretary of the Interior, that such sales were *bona fide* and of the class hereinbefore mentioned, and that the tracts so sold are selections in all other respects regular and proper, it shall and may be lawful for the said Secretary to approve such selections as a grant in fee-simple, and a transcript, certified

under the seal of the General Land Office, by the commissioner thereof, of such approval, shall vest the title in the Territory and in its *bona fide* vendees."

Said act of Congress is a special law passed for the purpose of meeting and providing for the special cases, which prior to the passage thereof had arisen in the Territory of Washington in relation to the reserved lands for universities. The object which Congress had in passing said act, as appears on the face thereof was to validate the title of the vendees of the Territory in and to tracts of land which had been purchased by individuals from the Territorial authorities, in just such cases as the one now before you for consideration. By the terms thereof certain facts were to be shown as facts to the satisfaction of the Secretary of the Interior, and when so shown to his satisfaction he was empowered to act, the legal effect of which act, so authorized, was to divest the United States of the legal title, and to vest said legal title in some individual; we say "in some individual," as it was a condition precedent to the passage of the title from the United States to show in every case that there was a *bona fide* vendee of the tract of land.

We claim that the approval by the Secretary of the Interior and the transcript certified under the seal of the General Land Office, by the commissioner thereof, see Record p. 91 and 92, constituted and was a patent to the land specified and described in such certified list, and that all laws, rules and decisions, pertaining to patents of the United States to lands, are applicable to the lands so approved and certified. Congress by said act constituted and appointed an officer of the government the sole judge as to the facts required to be shown as a condition precedent to the issuance of such patent, and no controlling or supervisory power is committed to any other officer, individual

or tribunal, and his decision thereon upon all such questions are absolutely conclusive.

Johnson vs. Towsley, 80 U. S. 91 (L. C. Ed., Bk. 20, p. 485).

Steel vs. Smelting Company, 106 U. S. 447 (L. C. Ed., Bk. 27, p. 226).

Vance vs. Burbank, 101 U. S. 514 (L. C. Ed., Bk. 25, p. 931).

French vs. Fyan, 93 U. S. 169 (L. C. Ed., Bk. 23, p. 813).

United States vs. Flint, 4 Sawyer, 42–87 (Myer's Federal Decisions, Vol. 21, p. 134).

Second. Because the same is a collateral attack upon a United States patent.

Steel v. St. Louis Smelting and Refining Co., 106 U. S. 447 (L. C. ed., bk. 27, p. 226).

United States vs. Flint, 4 Sawyer, 42–87 (Myer's Fed. Dec., vol. 21, p. 134).

United States vs. Throckmorton, 98 U. S. 61 (L. C. ed, bk. 25, p. 93.)

Vance vs. Burbank, 101 U. S. 514 (L. C. ed., bk. 25, p. 931).

Third. Because plaintiff in error is shown by the Record submitted herein to have been a stranger to the title for many years subsequent to the date of the sale and selection by the Territorial authorities of said tract of land, and therefore does not occupy such a position in relation thereto as entitles him to plead such question in any form of action. (See Record, pp. 18, 19 and 20.)

Redfield vs. Park, 134 U. S. 239–252 (L. C. ed., bk. 33, p. 327).

Gibson vs. Choteau & Moffit, 80 U. S. 104 (L. C. ed., bk. 20, p. 534).

Fourth. Because the evidence submitted herein shows that

plaintiff in error's relation to said tract of land, as shown of record in the United States land office at Seattle, was obtained through the inadvertence and mistake of the officer of said land office, and that the Honorable Commissioner of the General Land Office and Honorable Secretary of the Interior, the appellate officers of said land department, caused said mistake to be corrected by the cancellation of his said claim, upon their attention being called thereto. (See Record, p. 122.)

Miller vs. Kerr et al., 7 Wheaton, 3.

Fifth. Defendants in error herein have proven their full legal title to said tract of land, by showing patent from the United States, the sale by the Territorial authorities to John Ross, and by mesne conveyance from said Ross to Johan Brygger, their testator.

Plaintiff in error herein admits the sufficiency of said mesne conveyance from said John Ross to said Johan Brygger, and the evidence herein submitted conclusively proves the death of said Johan Brygger, his last will and testament, and the rights of these plaintiffs to bring this action as his representatives; the only question presented for the consideration of this Honorable Court by said plaintiff in error is as to the sufficiency and legality of the proceedings of the Secretary of the Interior and the university commissioners precedent to the issuance of said patent.

Defendants in error insist that the same constitutes no defense to their action under the laws of the United States and the State of Washington.

We claim that section 538 of the Code of Washington, permitting the defendant in an action of ejectment to set up a legal and equitable defense to plaintiff's claims, applies only to claims urged by plaintiff under contracts made under the laws of the state, in which cases the legal effect of such contracts are under

the sole jurisdiction of the state courts and are to be interpreted by the laws of the state, but the said provision is inapplicable to a United States patent, because such patent and the sufficiency thereof must be construed, and questions affecting the same, decided according to the laws of Congress and the decision of the Federal courts. The patent to land constitutes a contract between the government of the United States and the individual to whom the same is issued, and until such patent be revoked, recalled or annulled, by the decision of a competent tribunal, or until a court of equity shall by final decision have decreed the patentee to hold in trust for the use and benefit of an equitable owner, such patentee, as an incident to holding such land under the laws of the United States and the decisions of the Federal courts, has the right to immediate and exclusive possession of the tract of land so patented, and the further right to hold the same, not subject to collateral attacks upon the sufficiency of his said title.

We claim that any other interpretation of said provisions of the code would impair the rights of the patentee under his contract, and is an unwarrantable interference by the state with the United States in regard to the disposal of public domain upon such terms and conditions as it deemed proper, and that the same would therefore be unconstitutional.

2nd Fisher Patent Cases, p. 541.

Myer's Federal Decisions, Vol. 26, p. 794, § 4816.

IV.

Plaintiff in error, herein has wholly failed to show any equitable title in himself, and his defense, if held to be proper at all, is a defense which, while admitting the legal title to be in defendants in error, claims that the equitable title is in the United States; this plea constitutes no defense to defendant in error's

action; "a plea that the title to the land admitted is in the state; and not showing any title in the defendant, is bad, where the plaintiff was actually seized, and the defendant a mere trespasser."

Christy vs. Scott, 14 Howard, 282

Plaintiff in error herein shows no title, either legal or equitable, in himself, for the reason that any equitable right to said premises which might be in him by reason of the acceptance of his homestead filing for said tract, is completely annulled by the final decision of the Land Department in which the same originated decides upon final decision that the right so claimed was the result of inadvertance and mistake, and after the same has been finally cancelled by the decision of such officers. (Record, pp. 79 and 80 Ex. "G").

V.

But if we are wrong in our contention that it is not a case in which the facts are subject to review by this court, which we do admit, then we submit that the evidence sustains the facts as found both by the state court and the Honorable Secretary of the Interior.

The plaintiff in error claims that the land was not subject to selections as university lands for the reason that it was covered by the homestead of Holgate. See Record, pp. 66 and 67, testimony of Daniel Bagley, university commissioner, where Bagley testifies that before he filed the selection and before he sold the land to John Ross, he saw the relinquishment of Holgate and that he filed it or had it filed in the land office at Olympia. See also Record, p. 116, where a copy of relinquishment is set out dated February 16th, 1864.

See Record, p. 91, where certificate from secretary shows the date of selection as March 10th, 1864. See Record, pp. 89 and

90, showing conveyance by university commissioners to John Ross on March 10th, 1864. See Record, p. 120, where the State Supreme Court holds that deed to Ross under Act of Territory of Washington of October 26th, 1875, was sufficient to pass the title to Ross. Said act, section 1, reads as follows: "That all deeds of conveyance for university lands in this Territory, which have been executed since the passage of the act entitled, 'An Act to provide for the selection and location of the land reserved for university purposes, to appoint a board of commissioners, and to provide for the selection and location of a site for the territorial university.' Passed on the eleventh day of January, one thousand eight hundred and sixty-one, in the name of Daniel Bagley, president of the board of university commissioners, instead of being executed in the name of the Territory of Washington, shall be deemed, taken and held good and valid deeds in law; and shall have the force and effect to pass from the Territory of Washington to the purchaser or purchasers named in such deeds respectively, their heirs, executors, administrators and assigns, all the right, title and interest then vested, or which may hereafter be vested in the Territory of Washington, in and to the lands described in such deeds, as though in each and all respects the deeds in their form and manner of execution had conformed to the requirements of law."

From the above evidence and the law, it appears that said land was subject to selection; that it was selected and sold prior to March 14th, 1864, as decided by the State court.

As to the other facts decided by the State court, they being in relation solely to matters governed by State law, they are conclusive.

We have already seen that upon the facts as found the judgment of the State court was correct.

VI.

We further contend that in case the court should be of the opinion that the failure to note the cancellation of the Holgate entry upon the land office records until 1871, should in any way effect the right of the selection by the university commissioner on March 10, 1864, that such selection of March 10, 1864, was a continuing application on the part of the Territory for said lands up to and including the date of the cancellation upon the records in December, 1871, and took effect upon such cancellation and relates back to the application to select of March 10th, 1864.

Durand vs. Martin, 120 U. S. 366.

We respectfully submit that the judgment of the State court should be affirmed.

CHARLES K. JENNER,
LOUIS HENRY LEGG,
For Defendants in Error.